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No. 91-1030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,
Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.
Respondent.

ON WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

DO FEDERAL COURTS ON HABEAS CORPUS REVIEW OF A STATE COURT CONVICTION HAVE JURISDICTION TO FIND A PETITIONER'S STATEMENT INVOLUNTARY WHERE THE ONLY FIFTH AMENDMENT ISSUE RAISED IN THE STATE COURT, AND IN THE HABEAS PETITION, WAS WHETHER THE STATEMENT WAS ADMITTED IN VIOLATION OF THE PROPHYLACTIC MIRANDA RULES?

IF SO, WHERE THE PREMISE OF THE FIFTH AMENDMENT RULING IS A FINDING OF A MIRANDA VIOLATION, AND THE PETITIONER HAS HAD ONE FULL AND FAIR OPPORTUNITY TO RAISE THE MIRANDA CLAIM IN STATE COURT, DOES THE RULE IN STONE v POWELL, 428 US 465 (1976) BAR COLLATERAL REVIEW OF THE SAME CLAIM ON A HABEAS CORPUS PETITION?

IF NOT, IS A CONFESSION WHICH FOLLOWS MIRANDA WARNINGS INVOLUNTARY MERELY BECAUSE POLICE INDICATE THE POSSIBILITY OF LENIENT TREATMENT IF AN ACCUSED TELLS THEM THE TRUTH; AND IF SO, WOULD ADOPTION OF THE RULE ON HABEAS CORPUS VIOLATE THE PRINCIPLES OF SAWYER V SMITH, ___ US ___ ; 110 S Ct 2822 (1990) AND TEAGUE V LANE, 489 US 288 (1989)?

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OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 171 Mich App 234; 429 NW2d 649 (1990), and appears in the Petition as Appendix F, pp 92a-113a; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 432 Mich 911 (1990); the order of this Court denying a Petition for writ of certiorari is reported at 493 US 956 (1989). The order of the District Court granting the Petition for writ of habeas corpus is unreported, and appears in the Petition as Appendix D, pp 29a-86a; the opinion of the Sixth Circuit Court of Appeals affirming issuance of the writ is reported at 944 F2d 284 (1991), and appears in the Petition as Appendix A, pp 1a-25a; the order of the Sixth Circuit denying rehearing is unreported, and appears in the Petition as Appendix B, p 26a; the Judgment of the Sixth Circuit is unreported, and appears in the Petition as Appendix C, pp 27a-28a.

STATEMENT OF JURISDICTION

The District Court rendered its opinion on October 29, 1990, and entered judgment on November 1, 1990. The Sixth Circuit Court of Appeals issued its opinion on September 11, 1991, denied rehearing on October 3, 1991, and entered judgment on October 11, 1991. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of Amendments V and XIV to the United States Constitution appear in this Brief as Appendix A.

STATUTORY PROVISIONS INVOLVED

The provisions of 28 USC 2241 and 28 USC 2254 appear in this Brief as Appendix B.

STATEMENT OF THE CASE

On October 29, 1985, following a bench trial, the Michigan circuit court convicted Respondent of two counts of first-degree murder, and two counts of felony firearm. On November 6, 1985, the court sentenced Respondent to two concurrent terms of life

imprisonment for murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, following an evidentiary hearing, the trial court vacated one felony firearm count, and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Respondent's convictions in a published opinion. (Petition, 92a-107a). Respondent raised three issues in the appeal: a constitutional claim that the police had failed to give him Miranda warnings; ineffective assistance of counsel; and the adequacy of the trial court's fact findings. (6thCirJA, 66a-111a). On June 9, 1989, the Michigan Supreme Court denied Respondent leave to appeal; Respondent raised only the Miranda and ineffectiveness issues in this application. (6thCirJA, 127a-197a). On November 9, 1989, this Court denied Respondent's petition for writ of certiorari. Docket No. 89-5191, cert den 493 US 956 (1989). Petitioner had raised only the

Miranda issue in his petition. (6thCirJA, 198a-215a).

On or about December 7, 1989, Petitioner filed the instant petition for writ of habeas corpus with the District Court. Respondent claimed three grounds for issuing the writ: a violation of his Miranda rights; a claim that counsel was ineffective for failing to discuss plea bargain offers with him prior to trial; and inadequate fact findings by the trial court. (6thCirJA, 6a-12a). On October 29, 1990, the District Court issued an order, supported by a 33-page written opinion, reversing Respondent's conviction on two grounds: (1) the state trial court erred in holding that Respondent was not in police custody during his initial statement to police, and that Miranda warnings were therefore not required; and (2) his subsequent statements to police, though preceded by Miranda warnings, were coerced through promises of leniency and were therefore involuntary. (Petition, 29a-86a).

The District Judge found that the admission of these involuntary statements into evidence at trial required the reversal of Respondent's conviction. (Petition, 84a-85a). The Distict Court entertained no argument before issuing its ruling, and conducted no independent evidentiary hearing. However, the court appeared to base its conclusion on passages cited in two audiotapes, labelled "Rights in Office," (Petition, 60a-62a), and "Video," (Petition, 65a-68a). These two tapes comprised what the District Court described as the "second interrogation session," following the recitation of Miranda warnings, and formed what the District Court called the "critical question" in the case. (Petition, 63a). Although finding the evidence against Respondent "substantial," the District Court determined that the admission into evidence of the statements was not "harmless beyond a reasonable doubt." (Petition, 70a-85a).

The state court record of the proceedings discloses the following:

Defendant filed a suppression motion, claiming that the police arrested him illegally, violated his Miranda rights, and coerced him into making a statement. (JA, 4a-6a). At an evidentiary hearing into the matter, defense counsel argued that the first statement tainted all subsequent statements, and limited the evidentiary record to the tape recording of the first statement, and any relevant testimony. (JA, 19a-22a).

At the hearing, (JA, 7a-59a), the parties produced conflicting testimony on the matter of arrest, and the tenor of the interrogation. In a written opinion issued on September 27, 1985, the state trial court granted Respondent's motion to suppress his latter two statements, holding that the police did not have probable cause to arrest him following his initial statement, and that holding him in jail rendered his subsequent statements inadmissible on Fourth Amendment grounds. (Petition, 87a-91a). Concerning his first statement, and the two suppressed

statements, the trial court made the following relevant findings of fact:

> "Romulus police officers investigating two apparent murders heard that Defendant might have information about the decedents. They were admitted to Defendant's house by his mother on April 10. He was searched but not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon."

At trial, defense counsel requested that the court listen to the tape of Respondent's statement at trial, and suggested playing the tape in its entirety. The single audiotape, comprising Plaintiff's Exhibit #10, consisted of Respondent's initial statement to police, on April 10th, and was the only documented statement of Respondent's admitted at trial. (JA 76a-86a). While the existing record is

unclear, this tape apparently consisted of the initial, pre-Miranda statement and a short post-Miranda interlude on April 10th; the trial court record contains no reference to the existence of a second audiotape admitted at trial. However, included in Sgt. Early's testimony was a reference to details, consisting of "throwing out boots, throwing out coats, throwing out guns," that came from "a subsequent interview approximately 15 to 20 minutes after" the one contained in Exhibit 10. (Ibid).

On appeal, the Sixth Circuit affirmed issuance of the writ. While acknowledging that the district court's opinion "inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court," the Circuit Court held that "our conclusion that the inculpatory statements made on April 10 should have been excluded still mandates a new trial," and approved the District Court's finding "that the admission of the April 10

statements was not harmless error." (Petition, 21a, 24a). The Circuit Court did not discuss whether the District Court's harmless error analysis was directed to statements which were not admitted into evidence at Respondent's trial.

On October 3, 1991, the Sixth Circuit denied Petitioner's motion for rehearing. (Petition, 26a). On April 20, 1992, this Court granted certiorari.

SUMMARY OF ARGUMENT

Over the last forty years, this Court has transformed the writ of habeas corpus from a powerful writ of limited application, into a general writ of federal error. The Court has done so without express authorization by Congress, by changing its construction of the applicable statutes. In doing so, the Court has countenanced a rising tide of habeas filings which afflict both the State and Federal legal systems, and inspired the

widespread relitigation of issues raised and settled on direct appeal.

In this case, the State courts -- as well as this Court -- rejected Respondent's Miranda claim on direct appeal. To permit Respondent to relitigate the matter on habeas review, is an unconscionable waste of scarce judicial resources, and ignores the powerful interests of federalism that lie at the heart of our system of government. Moreover, by abusing the habeas authority given them in this case, the lower federal courts have demonstrated that they are not immune to misadventure; that they are just as likely to blunder as State courts; and that it is folly to assume that Federal courts are inherently superior in deciding questions relating to the rights of citizens merely because they have no responsibility for local law enforcement.

To remedy this sorry state of affairs, Petitioner suggests applying the rule in Stone v Powell, 428 US 465 (1976) to the

facts of this case, barring relitigation of the issues fully and fairly litigated in Respondent's state court proceedings. The Court may do this in one of two ways: it may bar relitigation of Miranda claims on habeas review; or it may bar relitigation of all Fifth Amendment claims on habeas review. Either approach would solve the problem in the case at bar, and limiting the holding to Miranda claims would most closely tie resolution of the case to those matters actually raised below, leading to the narrower holding; however, the broader approach has the advantage of simplicity, would solve the greater number of problems, and would restore the writ of habeas corpus to its proper historical function.

ARGUMENT

I.

A STATE CRIMINAL DEFENDANT WHO HAS HAD A FULL AND FAIR OPPORTUNITY TO RAISE A FIFTH AMENDMENT CLAIM IN STATE COURT MAY NOT RELITIGATE THE MATTER ON FEDERAL HABEAS REVIEW.

> **"At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."**
>
> Justice Holmes, dissenting in Kepner v United States, 195 US 100, 134 (1904).

INTRODUCTION

This case presents the modern parable of habeas corpus run amok: setting aside a first-degree murder conviction, the District Court reversed a State ruling permitting the use of Respondent's confessions, finding the three confessions -- made on April 10, April 11, and April 12, 1985 -- to be involuntary, and their admission to be reversible error. Petition, Appendix, pp 84a-86a. Despite obeisance to the "presumption of correctness" owed to state court findings, ibid, at 43a, the district judge did not notice that, as the trial court had ruled the police had

no probable cause to arrest Respondent, and suppressed the statements made on April 11th and April 12th on Fourth Amendment grounds. The district judge also never acknowledged that while Respondent had claimed only that admission of the April 10th statement violated the rule in Miranda v Arizona, 384 US 436 (1966) in his state appeal and federal habeas petition, not that that his confessions were involuntary. The Sixth Circuit, noting that the District Judge had "inexplicably" overlooked the point, nevertheless took Petitioner's concession about exhaustion of the Miranda claim to cover the entire Fifth Amendment,[1] and proceeded to affirm the finding of involuntariness -- leaving counsel for

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[1] In light of this Court's holdings in Michigan v Tucker, 417 US 433 (1974) and Harris v New York, 401 US 222 (1971), it is curious that neither the District Judge, the Circuit Court, nor the Respondent (see Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp 19-22) recognize the distinction between Miranda claims, and claims of involuntariness.

Petitioner the unenviable task of trying to explain the unexplainable, and looking like a fool in the process.

This Court could treat this case as a question of exhaustion, and find that the voluntariness of the confession was not properly before the habeas court.[2] Or, it could look to the lower court's reasoning,

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2 Under Picard v Connor, 404 US 270, 276-277 (1971) and Anderson v Harless, 459 US 4 (1982), a habeas court may not grant relief unless the petitioner has "fairly presented" his claim for relief to the State court.

In this case, Petitioner included a claim of involuntariness in his trial court suppression motion, but appealed his conviction on Miranda grounds -- primarily seeking to convince the state courts to adopt the more favorable "focus" test as a trigger for giving Miranda warnings, but nevertheless containing language suggesting that, even under the Federal "custody" test, he should prevail. (6thCirJA, 66a-111a, 127a-182a). As the question of involuntariness was not "fairly presented" on his State appeal, Petitioner has not exhausted his state remedies and the district court's proper order was a dismissal. Anderson v Harless, supra. And as Respondent may still raise the point under state law, see MCR 6.500 et seq, the District Court's consideration of the point was improper under 28 USC 2254(b)-(c). Moreover, as the habeas petition itself did not raise the question of voluntariness,

and reverse on the merits.[3] However,

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2 Continued
(6th CirJA, 6a-12a), the District Court had no authority to grant relief on such grounds -- and Petitioner is still awaiting an opportunity to respond to such a claim at the district court level. See also, JA, 19a-22a (Limiting state court suppression record to first tape).

This, of course, leaves aside the point that the district judge appears to have reversed a state first-degree murder conviction due to perceived coercion relating to two confessions that the state court had already suppressed on other grounds. And it would save for another day the potentially embarrassing question of whether a reviewing court should simply affirm the district court's grant of the writ under such circumstances -- or whether, as Petitioner suggested in the Sixth Circuit, the district judge's failure to perceive that she was discussing evidence which was never admitted at trial might indicate her lack of awareness of the true state of the record, and may betray a lesser degree of deference to the state findings than 28 USC 2254(d) required her to show.

3 The District Judge based her opinion on "objectively coercive police activity" (6thCirJA, 19a) consisting of police statements to Respondent that "if he was a witness, and he had no active part in the crime, and that could be confirmed by polygraph, that he would not be charged." (Ibid, 17a; see also, District Court Opinion, Petition, at 60a-71a). Leaving aside the question of deference to a state court finding -- the State courts having had no occasion to address the point, there is no such finding on which to rely -- finding such representations to be "coercion" within

focusing on such clear errors in application would ignore the question at the heart of this case.

Petitioner suggests that a proper resolution of this case requires the Court to apply the principles recognized in Stone v Powell, 428 US 465 (1976) to the case at bar. For a variety of reasons, Petitioner submits that Respondent's opportunity in the State courts for a full and fair litigation of the points he raised in the District Court should resolve the matter, rendering the District Court's ruling beyond the scope of its proper authority on collateral review.

3 Continued
the meaning of the Fifth Amendment is not consistent with any prior holdings of this Court, nor consistent with the weight of authority around the country. See, eg, United States v Mast, 735 F2d 745 (CA 2, 1984); Commonwealth v Saya, 17 Mass App 921; 456 NE2d 764 (1983); People v Pinkham, 139 Ill App 3d 554; 487 NE2d 707 (1985). Accordingly, as a new rule of law, it cannot form the basis for relief on habeas review. Teague v Lane, 489 US 288 (1989); Sawyer v Smith, ___ US ___; 110 S Ct 2822 (1990). In addition, as it suggests that persuasion is an improper interrogation tool, it appears to violate common sense. See, eg, Grano,

A.

HISTORY OF THE WRIT

1.

Origins and Development

While the precise origins of the writ of habeas corpus are largely lost to History,[4]

3 Continued
Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich L Rev 662 (1986). See also, Grano, Voluntariness, Free Will and the Law of Confessions, 65 Va L Rev 859 (1979) for an interesting discussion of the concept of "voluntariness."

In any case, this also leaves aside the question of whether a district judge who reverses a state murder conviction without realizing that most of the evidence she is reviewing was never admitted at trial is really according the state court findings the proper level of deference. See supra, note 2.

4 While scholars have traced the writ's tendrils back to the century after the Norman Conquest, its earliest shaping influences are a matter of speculation. Cohen, for instance, has declined to guess whether its ultimate origins stem from William and the Normans, or from indigenous Saxon traditions. Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can B Rev 92, 115-116 (1938). Duker, on the other hand, finds an early form of the writ "firmly established by

its earliest known functions were entirely practical: the court issued an order to the local sheriff to produce one whose presence would assist the court in some pending legal matter, but who insisted upon absenting himself from the proceedings. Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can B Rev 92, 110-111 (1938). This order, known as a writ of habeas corpus,[5] was the King's command that an officer deliver a designated person into the presence of the issuing judge. By the middle of the Thirteenth Century, royal courts were often "availing themselves of this direct command to their sheriffs...to have before them a defaulting defendant, an escaping accused, or a spiteful accuser, so that justice may be

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4 Continued
1230," and finds earlier influences in the medieval courts of Eight Century England. Duker, A Constitutional History of Habeas Corpus 12-17 (1980).

5 Literally, "Thou shalt have the body."

done and the King's Peace maintained."[6] Cohen, at 111 (Citations omitted; emphasis in original). And in the next century, use of the writ would spread, as courts found itincreasingly useful as a method of "forc[ing] stubborn jurors to their duty,"[7] as well as a means of inquiring into the cause of a prisoner's detention.[8]

However, with its expanding use the writ itself became a tool of political power: if, after all, the common law courts could order

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6 The modern scholar should not underestimate the scope of such an undertaking, for travel in medieval times was, as Cohen notes, "no small feat." These were, after all, the days of knights and wizards, when "pursuit into the next shire was high adventure." Cohen, Habeas Corpus Cum Causa -- The Emergence of the Modern Writ, 18 Can B Rev 10 (1940).

7 Cohen, at 18 Can B Rev 19.

8 As one scholar has noted, this early writ, known as "habeas corpus cum causa," marks the beginning of the modern writ, in that it was one of the earliest devices known to English jurisprudence "for subjecting incarceration to some kind of judicial scrutiny." Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 10 (1966). Moreover, this use marked its expansion from an ancillary writ,

the release of anyone detained, then they, in the name of the Crown, effectively commanded the obedience of any jailer and could impose their will on any other court of the realm.[9] Such a power ensured the eventual dominance of King's Bench over the other English courts; and in the 1600s, King's Bench would come to consider whether the King's judges could question a royal order of the King himself.

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8 Continued
used only in connection with some other pending legal action, to a proceeding with independent significance. See Sokol, Federal Habeas Corpus 6 (1969); Duker, at 23-33.

9 Meador has suggested that, in the conflict between the common law and chancery courts, habeas corpus became the means by which Kings Bench ultimately established its supremecy. Meador at 17. See Duker, at 33-34. See also Cohen, at 16 Can B Neo 112, 116-117.

The ancient struggle between King's Bench and Chancery may very well have a modern analogue in the modern debate over the proper scope of habeas review.

It does not take much imagination to see the "Federal Bench" following in the footsteps of King's Bench, and some day undertaking the control and supervision of our entire criminal courts system -- much as the English court came to nationalize British law a few centuries earlier.

In Darnel's Case, 3 How St Tr 1 (1627),[10] five knights of the realm had been imprisoned "by special command of His Majesty,"[11] for refusing to comply with a "forced loan" measure the King had decreed in order to meet a temporary shortage in the State treasury.[12] Filing a habeas corpus petition before King's Bench, the knights challenged the cause of their detention, claiming that the guarantees of Magna Carta guaranteed them due process of law, and a detention merely on the King's

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10 Also known as the Five Knight's Case. See, inter alia, Meador, at 13-19; Sokol, at 9-12.

11 Ie, "per speciale mandatum Domini Regis." See Meador, at 13.

12 Similar problems remain with us to the present day. US House Appropriations Committee, The Federal Budget for 1992: Hearings before the Committee on Appropriations of the House of Representatives (1991); cf, 26 USC 7201 et seq.

In these days of rapid and unprecedented change -- from the fall of Communism, to the ominous rise of the designated hitter rule -- perhaps we may take solace in the fact that some things never change.

command violated the law of the land. But the institutional forces at work proved too powerful for the courts to ignore, and the justices were reluctant to intervene in the matter without a further grant of authority: "After all," one authority has commented, "the Justices of the King's Bench...were the King's judges, and...the writ of habeas corpus was a writ issuing in the King's name." Meador, at 17. Accordingly, the court would not look beyond the Crown's return to ask the reasons for the King's command, for upon the King's word the commitment was "presumed to be for matter of state," with no relief available from the habeas court; and if the King would not reveal the cause of confinement, the matter was effectively closed to his courts.

Perhaps uncomfortable with the implications of such a ruling, Parliament passed the Petition of Right the following year, 3 Car I, c.1 (1628), requiring that the Crown's return of the writ contain the

cause of commitment -- and that this cause be more detailed than a cryptic "by special order of His Majesty." See Meador, at 19-22. Not satisfied with the results, Parliament enacted the Habeas Corpus Act of 1641, 16 Car I, c.10 (1641), eliminating the Crown's power to arrest without probable cause, granting immediate access to the writ to all accused persons wishing a judicial determination of the legality of their detention, and abolishing Star Chamber. See, Duker, A Constitutional History of Habeas Corpus, 47-48 (1980); Sokol, at 12-13. See also, LaFave & Israel, 3 Criminal Procedure, sec 27.1, pp 286-287 (1984). And in 1679, Parliament enacted the landmark Habeas Corpus Act of 1679, 31 Car II, c2 (1679), which marks the beginning of our modern practice.[13]

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13 Sokol notes that the circumstances of the Act's actual passage may owe more to the wit of its proponents than to the merits of the Act itself: it is reputed that Lord Grey, a teller in favor of the Bill, counted

That the 1679 Act broke no legal ground is a matter of historical fact: the Act itself sought "to clarify practice and...to make the writ a more effective remedy," but it "dealt with no profound questions and introduced no legal principles." Meador, at 25-26. Still, one noted commentator concluded that it confirmed the writ as an effective tool "for the protection of the liberty of the subject, by providing...for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial." Holdsworth, 9 A History of English Law, 118 (1926). But the Act carefully circumscribed the writ's usage: it did not cover "persons

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13 Continued
one "very fat Lord for ten," intending it as a joke. But when the Opposition's teller failed to catch his jest, Lord Grey managed to hold his tongue, insuring the Bill's passage into Law. Sokol, at 14, citing Anectdotal History of the British Parliament, 40 (1881). See also, Cohen, at 18 Can B Rev 185.

convict or in execution by legal process," rendering it inapplicable to proceedings having matured into a judgment of criminal conviction. Its principle concern was pretrial detention of those awaiting trial for some criminal offense -- that is, it touched upon executive detention, or detention which was "not pursuant to judicial process." Meador, at 26-27. And the Act excluded those detained "upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters," thereby making it "unavailable for the bulk of judicial detentions." Meador, at 27. See also, Coke, 2 Institutes, 52 (1642). But where a court had exceeded its proper jurisdiction, the authorities agreed that habeas corpus was a proper remedy to seek the prisoner's release. Bushell's Case, 124 Eng Rep 1006; 6 How St Tr 999 (CP, 1670);[14] King v Hawkins, 92 Eng Rep 849 (1715);

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14 In Fay v Noia, supra at 402-405, Justice Brennan cited Bushell's Case to

Rex v Collyer, 96 Eng Rep 797 (1752); Souden's Case, 106 Eng Rep 945 (1821).

Following a half-century of rapid growth, the Act of 1679 brought a measure of stability to English law and practice, establishing habeas corpus as a legal expression of some of the noblest ideals of a People growing to meet the challenges of a New World. A century later, Blackstone would call the writ of habeas corpus "the most celebrated writ in the English law." Blackstone, 3 Commentaries on the Laws of

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14 Continued
stand for the proposition that a writ of habeas corpus was available to challenge imprisonment based upon a conviction obtained under judicial process. However, as Professor Oaks has demonstrated, Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich L Rev 451, 461-468 (1966), this stems from an inexplicable misreading of the case. Moreover, the notion that after Bushell a court could undertake to review errors of law on a writ of habeas corpus must come as quite a surprise to the British, who were under the distinct impression that their law was decidedly to the contrary. See, Ex Parte Lees, 120 Eng Rep 718, 721 (1860); Brenan's Case, 10 QB 492; 116 Eng Rep 188 (1847).

England, 129 (1768). As he wrote, a new Nation was rising on the western shores of the Atlantic, and both England and her offspring would claim the Great Writ as part of their shared legal heritage.

2.

The American Writ

Throughout Colonial times, the English settlers in the New World jealously sought the protections afforded subjects of the Crown, and several Colonies formally incorporated the writ of Habeas Corpus into their laws or charters.[15] By the time of the Constitutional Convention of 1787, usage and practice had made the writ such an organic part of the law that less than half of the new States found it necessary to include provisions for the writ as part of their own constitutions, yet nearly all subsequently adopted provisions patterned after the Federal limit on the writ's

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15 In 1692, the Massachusetts Assembly sought to adopt the Habeas Corpus Act of

suspension.[16] US Const I, 9. However, the Constitution's only mention of the writ[17] comes as a limitation on Congress' power to suspend a state's writ for prisoners in

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15 Continued
1679 as part of its formal legal structure, only to have their wishes vetoed by the British. Curiously, the British permitted South Carolina to adopt the Act in the same year -- and conferred its provisions upon Virginia a few years later by royal proclamation. The remainder of the Colonies appear to have invoked the writ as the need arose, implying that the colonial courts assumed its application even in the absence of a specific grant of authority. See Meador, at 30-31. See also, Hurd, A Treatise on the Right to Personal Liberty and on the Writ of Habeas Corpus, 111-115 (1858).

16 As Collings notes, at the time of the Constitution a "suspension" of the writ had a specific meaning under English law: it was a "legislative enactment which caused the Habeas Corpus Act to cease to operate," permitting "confinement without bail, indictment, or other judicial process." Collings, at 339-340. An example of suspension occurred during the Revolutionary War, when Parliament enacted 17 Geo III, c9 (1777), and similar statutes for the duration of the rebellion

17 US Const I, 9, cl 2 provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

federal custody. Duker, A Constitutional History of Habeas Corpus, 126-180 (1980); see also, LaFave & Israel, at 289-290. Not until the Judiciary Act of 1789[18] would federal courts have the power to issue writs on their own authority.

In 1789, Congress extended the jurisdiction of the fledgling federal courts to include the granting of "writs of habeas corpus for the purpose of an inquiry into the cause of commitment," although exempting from its reach "prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States...or are necessary to be brought into court to testify." 1 Stat 81, sec 14. Noting that Congress controls the jurisdiction of the Federal courts, this Court nevertheless examined the common law usage of the writ. for an understanding of "the meaning of the term habeas corpus." Ex Parte Bollman, 8 US (4 Cranch) 75, 93-94 (1807). And a look at

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18 1 Stat 73, 81-82 (1789).

history led this Court to recognize the limitations on the writ Congress had authorized: while recognizing its power to issue a writ to free someone held in jail, the Court found contempt convictions entered by courts of competent jurisdiction to be unreviewable on habeas corpus, Ex parte Kearney, 20 US (7 Wheat) 38 (1822); and in Ex parte Watkins, 28 US (3 Pet) 193 (1830), the Court held that a return showing a petitioner held pursuant to a criminal conviction was sufficient to justify the petition's dismissal.[19] A habeas court could not, after all, inquire into the substance of a criminal conviction, beyond satisfying itself of the entering court's

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19 In 1830, this Court had no appellate jurisdiction to review district court judgments directly. Subsequent statutes conferred upon the Court the power to grant writs of certiorari, 25 Stat 656 (1889); 26 Stat 828 (1891), and conferred appellate powers upon the circuit courts. 20 Stat 354 (1879).

While this Court may now grant certiorari to review state court judgments on federal issues of law, 28 USC 1257, nothing in the

jurisdiction.[20] For the rest, the prior court's judgment itself provided cause for the detention:

> "The writ [of habeas corpus]... brings up the body of the prisoner with the cause of commitment. The court can undoubedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction...is not that judgment itself sufficient cause? Can the court, upon this writ, look beyond the judgment and re-examine the charges on which it ws rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it....An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the

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19 Continued
law currently grants federal district courts the appellate powers to entertain direct review of state court judgments.

20 See, eg, Ex parte Milligan, 71 US (4 Wall) 2 (1866)(Holding that military courts had no jurisdiction to try civilians in areas were civil authority was functioning normally).

However, in the case of detentions pursuant to State law, federal courts had no jurisdiction to issue the writ at all. See, Ex parte Dorr, 44 US (3 How) 103 (1845).

subject, although it should be erroneous." Watkins, supra at 202-203.

Between Watkins and the Civil War, the American writ underwent minor changes in response to perceived shortcomings in the law: noting local reaction to the "Tariff of Abominations" of 1828, Congress extended the writ in 1833 to include federal agents held in state custody for acts done "in pursuance of a law of the United States." 4 Stat 634 (1833). In 1842, following a British national's state trial for murder, Congress extended the writ to include state-held foreign nationals. 5 Stat 539 (1842). See, Collings, at 351. But the first major change in the American writ would come in the aftermath of the Civil War, as an aid to Reconstruction. See generally, Mayer, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U Chi L Rev 31 (1965).

In 1867, Congress passed the Habeas Corpus Act of 1867, 14 Stat 385 (1867).

21 Attracting little notice at the time, the Congressional debates suggest that the Act's draftsman saw it as an aid to the Federal government in enforcing the "rights and liberties" of those who had been recently freed from slavery. Mayer, at 36-41. But whatever the intent of either House of Congress,[22] the Act extended the authority of federal judges to grant writs of habeas corpus "in all cases where any person may be restrained of his or herliberty in violation of the constitution, or any treaty or law of the United States." Enacted just prior to the Thirteenth, Four-

21 The Court will find a copy of the Act in Appendix C to Petitioner's Brief.

22 As Mayer notes, Sen. Trumbull, the Chairman of the Senate Judiciary Committee appears to have put a broader application on the measure than Rep. Lawrence, its sponsor. Mayer. at 40-43. In addition, it is curious that neither the Act, nor its sponsor in discussing its purpose, ever mentioned state "prisoners" at all. See Mayer, at 36-37. But given the limited application of the Bill of Rights at the time, perhaps the very notion that a state prisoner, convicted of a state criminal offense, could be held in violation of the constitution, laws, or treaties of the United States would have been dismissed as hopelessly misinformed.

teenth, and Fifteenth Amendments, the Act was among a host of Congressional enactments seeking to pull the country back together in the days following the Civil War; but the phrase "in violation of the constitution or laws or treaties of the United States" contained in our modern statute[23] is merely the 1948 recodification of the same language employed by the Reconstruction Congress -- predating ratificaton of the Fourteenth Amendment by several months, and predating the widescale application of the federal limitations contained in the Bill of Rights against the States by nearly a hundred years.

3.

The Giant's Robe[24]

The end of the Civil War ushered in an era of widespread change to the American

23 28 USC 2254(a).

24 Cf, Macbeth, V, ii, 19-22:
"Those he commands move only in command,
Nothing in love. Now does he feel his title
Hang loose about him, like a giant's robe
Upon a dwarfish thief."

Republic: freed from the bitter divisions arising from the practice of slavery,[25] and drawn by the allure -- as well as the reports of gold -- of the American Frontier, the country expanded rapidly in the late Nineteenth Century, coming to dominate the continent from coast to coast and laying the foundation for the industrial colossus that the United States would grow to become.[26] But these years of unprecedented growth and

25 Ironically, this Court's holding in Dred Scott v Sandford, 60 US (19 How) 393 (1857) -- among the earliest examples of a "noninterpretivist" mode of constitutional analysis, which invalidated the basis of the Missouri Compromise -- undoubtedly contributed to the tension in the days before the Civil War, and may well have interrupted widescale exploration of the continent until the country reached a final resolution of the slavery question.

As Professor Grano has noted, it is curious that "[t]he fact that a bloody civil war was necessary to rectify the mistake in Dred Scott" does not give the proponents of noninterpretivism more pause than it does. Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 Wayne L Rev 1, 38 n 177 (1981).

26 Unfortunately, the native inhabitants of the lands explored and settled during the time took a different view of the matter. See, eg, Brown, Bury My Heart at Wounded Knee: An Indian History (1970); Beal, I

change, with the corresponding alterations in the balance of power between the states and the federal government, saw little alteration in the reach of the American writ of habeas corpus, or upon the federal judiciary's conception of its power and responsibility.

While the Act of 1867 conferred habeas authority on the federal courts to issue writs on behalf of those "restrained of... liberty in violation of the constitution," the language of the Act contained nothing implying a broadening of the writ itself. The law of habeas corpus was, after all, measured in centuries, and the historical purpose and limits of the writ were widely

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26 Continued
Will Fight No More Forever: Chief Joseph and the Nez Perce War (1963); Sandoz, Crazy Horse: The Strange Man of the Oglalas (1942).

In addition, this Court's largely noninterpretivist holding in Plessey v Ferguson, 163 US 537 (1894) would limit the application of the Grand Army of the Republic's efforts in overturning the decision in Dred Scott, leading to unfortunate, and perhaps preventable consequences in our own day.

known and well-recognized.[27] Though Congress had given the federal bench the authority to inquire into the confinement of those held in State custody, this Court showed a distinct disinclination to rewrite the statute to expand the scope of federal habeas review: while Ex parte Lange, 85 US (18 Wall) 163 (1873) extended the scope of review to include illegalities in sentencing, the Court still retained its focus on the committing court's jurisdiction, for if -- as in Lange -- a court imposes two sentences where only one is permitted, it is clearly exceeding its jurisdiction.[28] Similarly, as

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27 See, eg, Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv L Rev 441, 474-477 (1963)(Noting that, as well-understood at the time of the 1867 Act, the function of habeas corpus was to "assure the liberty of subjects against detention by the executive or military without any court process at all, not to provide postconviction remedies for prisoners").

28 See also, In re Snow, 120 US 274 (1887) and Ex parte Nielsen, 131 US 176 (1889)(Both holding that multiple indictments charging a

an unconstitutional statute confers no jurisdiction to punish, in Ex parte Siebold, 100 US 176 (1889) this Court held that a court sentencing a petitioner for violating a void statute was also acting beyond its jurisdiction. But the Court viewed this as a matter of simple common sense: since the sentencing court acquired no jurisdiction in either case, habeas relief was proper in both. This flowed logically from the rule that writs of habeas corpus offered no relief to prisoners convicted by a court of competent jurisdiction, Ex parte Parks, 93 US 18 (1876) for the rule's corollary was that jurisdictional failures rendered any ensuing detention unlawful.[29] And the

28 Continued
single offense deprives the sentencing court of jurisdiction to impose punishment for more than one offense).

Similarly, the Court found jurisdiction to impose sentence lacking in cases of an "infamous" crime, where there was no grand jury indictment to confer jurisdiction on the district court. See, eg, Ex parte Wilson, 114 US 417 (1885).

29 Interestingly, this Court would also reject the notion that a constitutional

holdings contained an important acknowledgement of the federal character of our Republic, which gave each distinct political unit of government unique powers and responsibilities, and assumed that each was capable and honest in the execution of its duties.

Therefore, the earliest cases after the Act of 1867 demonstrate the continuing nature of habeas corpus as an historically sanctioned writ, powerful in its execution but limited in its scope. This stemmed from Chief Justice Marshall's classic formulation that, even substantive errors by a court having proper jurisdiction would give no grounds for habeas relief, because

29 Continued
issue would automatically call the committing court's jurisdiction into question. See, Ex parte Bigelow, 113 US 328 (1885)(Distinguishing Lange because cumulative sentences were never actually imposed).

See Thompson, Abuses of the Writ of Habeas Corpus, 18 American L Rev 1, 16-18 (1884), for insight into the understanding of contemporary lawyers into the scope and meaning of the writ in the years following the Civil War. See also, Meador, at 61-62.

"the law trusts that court with the whole subject." Ex parte Watkins, supra at 206. And it embraced a conception of "due process," contemporaneous with the Fourteenth Amendment, which later Courts would come to forget:

> "[In] a case in which the state had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States." Ex parte Bridges, 4 Fed Cas 98, 106 (CirCt, ND Ga, 1875)(Bradley, J, sitting as Circuit Justice).

Accordingly, this Court would come to hold that a habeas petition would not support a criminal defendant's challenge to a statute permitting a waiver of trial by jury, as such a claim did not go to the jurisdiction of the court. In re Belt, 159 US 95 (1895); see also, In re Eckart, 166 US 481 (1897)(Applying nonjurisdictional rule in Belt and Bigelow to state prisoners). And writing for a unanimous Court in 1906,

Justice Holmes would observe petitioners could not litigate claims of compulsory self-incrimination under the Fifth Amendment on habeas because, even assuming the existence of error, "it did not go to the jurisdiction of the court." Matter of Moran, 203 US 96, 105 (1906).[30]

At this juncture, a half-century after Congress enacted the 1867 Act, the Court's holding in Frank v Mangum, 237 US 309 (1915) offers a striking, and often under appreciated, development in the law: a state prisoner on Georgia's death row sought a writ of habeas corpus from the district court, claiming that a hostile public climate surrounding his trial had influenced

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30 This also appears to be the scope of the Great Writ in modern Britain. See, Wilkes, Federal and State Postconviction Remedies and Relief (1992 Ed), 41-59 (1992); Gordon, Challenging Convictions by Habeas Corpus and Certiorari, 2 Crim L Q 296 (1959). Given the availability of direct review, the English bench and bar seem to have concluded that "postconviction habeas relief is not needed," with the result that,

the jury against him, making a fair trial impossible. On direct appeal, Frank v State, 141 Ga 243; 80 SE 1016 (1914), the state supreme court considered and rejected the claim, holding the trial court maintained sufficient order and decorum during the trial to render innocuous the few minor disruptions that occurred: moreover, the affidavits of the jurors, attesting that the public cheering on the streets, audible inside the courtroom as they were polled on this verdict, did not affect them, demonstrated the lack of prejudice to the accused. The district court rejected the claim and refused to grant the writ.

On appeal, this Court recognized that "[m]ere errors in point of law, however

30 Continued
at the present time, "there is hardly any [postconviction] habeas corpus litigation in England," and "no reported English cases in the twentieth century" granting habeas corpus relief to anyone convicted of an indictable offense in a superior court. Wilkes, at 59. See also, Meador, Criminal Appeals: English Practices and American Reforms 74 (1973).

serious, committed by a criminal court in the exercise of its jurisdiction...cannot be reviewed by habeas corpus." Ibid, at 326. Still, the Court emphasized that this stemmed from considerations greater than comity: the Court would not, consistent with its responsibilities under the Fourteenth Amendment, view the jurisdictional facts as "conclusively determined against the prisoner" by the state courts, ibid, at 334, for this would reduce the guarantee of "due process" into a shadow without substance. But the Court's inquiry was, of necessity, limited by principles of federalism:

> "[T]his does not mean that [the state court] decision may be ignored or disregarded. To do this, as we have...pointed out, would be not merely to disregard comity, but to ignore the essential quesiton before us, which is...whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operation of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him

> arbitrarily or without the right to be heard according to the usual course of law in such cases." Ibid, at 334-335 (Emphasis added).

Turning to the particulars of the case, Justice Pitney acknowledged that "trial by mob" was an inadequate substitute for "trial by jury":

> "We...agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into executing a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law." Ibid, at 335.

Even so, where the state provides an adequate "corrective process," likely to correct any error as it occurs, then the Federal inquiry is correspondingly larger in outlook, yet narrower in scope: due process, after all, embodies "the entire process of law," rather than isolated courtroom proceedings. Ibid, at 336. And where the State affords the

defendant a fair chance for relief, but declines to act because it finds the defendant's claims groundless, there is "no denial of due process" and no basis for habeas relief. Ibid, at 337-338. Such a limitation of the writ, the Court found, was implicit in the American system of government:

> "It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments." Ibid, at 329.

Though rejecting the petitioner's claim for full review on the merits, the Frank Court shifted its focus in several subtle, yet significant ways: continuing to view

"jurisdiction" as the limit of its focus, the Court perceived that state court failures to protect a citizen's due process rights divest it of jurisdiction to render judgment, entitling him to relief from the Federal courts. This widened "jurisdiction" to include matters transcending the court's bare authority to entertain the subject matter, and reached into the heart of the lawsuit. Although the Court disapproved the practice of reviewing matters were fully litigated in state court, it established a potential base for the writ's later transformation into a forum for post-conviction inquiries into questions of substantive law. But the Court also acknowledged that a state's "jurisdiction," once properly invoked, embodied an entire process of law, rather than an isolated proceeding. And in directing its inquiry toward the adequacy of the state process, rather than the "correctness" of a particular outcome, the Court appeared to

recognize that perfect truth -- like perfect wisdom -- is an ideal unattainable by the limited means available to a race as imperfect as Man. See Bator, at 486-487. Given a "full and fair litigation" of a controlling point of law, Bator, at 487, the Frank Court held, a state had accorded its citizen "due process of law," and the Federal courts had no basis to intervene.

While the point is a matter of some dispute,[31] this Court confirmed the Frank rule in Moore v Dempsey, 261 US 86 (1922): Arkansas had convicted Moore and others of capital murder for killing a man during a race riot, sentencing them to death. Accepting the State's demurrer on the facts alleged, the district court dismissed the petition on grounds of insufficiency. But the Court, speaking through Justice Holmes,

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31 See, eg, Hart, Foreward, 73 Harv L Rev 84, 105 (1959); Liebman, 1 Federal Habeas Corpus Practice and Procedure, sec 2.2, pp 9-11 (1988); Peller, In Defense of Habeas Corpus Relitigation, 16 Harv Civ Rts-Civ Lib L Rev 579, 644-654 (1982).

found that the petition alleged a trial conducted amid the blood passions of a mob, that the jurors could not have voted to acquit and still continued to live in the community, and that evidence procured by the State included confessions induced by physical torture. The petition also claimed that Arkansas dismissed the claim of unfair trial on the existing record, without the advantage of an dispassionate inquiry, outside the influence of the mob, into the actual facts of the case. Justice Holmes noted the holding of Frank, that "the corrective process supplied by the state may be so adequate that interference by habeas corpus ought not to be allowed." Moore, supra at 91. But as the state had supplied no "corrective process" to afford petitioners the chance to make their case in state court, the federal courts had to inquire into the true state of facts to provide the "corrective process" needed to insure the petitioners due process of law. Cf, Mooney v

Holohan, 294 US 103 (1935); Ex parte Hawk, 321 US 114, 118 (1944).

This, then, formed the basic premise of the Court's treatment of habeas petitions until the middle of this Century: aware that some rights had a greater impact on the accuracy and legitimacy of the truth-finding process than others,[32] this Court nevertheless held to the principle that the federal courts would not relitigate a principle of law on a habeas petition. Where a State's proceedings have provided a meaningful forum for correcting any errors stemming from a criminal prosecution, the mere possibility of State error, or a difference of opinion between state and federal judges, would support no claim for relief. Cf, Ex Parte Hawk, supra; see Bator, at 493-499. Thus, in his opinion in

32 See, eg, Johnson v Zerbst, 304 US 458 (1938)(Denial of counsel); Walker v Johnston, 312 US 275 (1941) and Waley v Johnston, 316 US 101 (1942)(Coerced guilty pleas).

Schectman v Foster, 172 F2d 339, 341 (CA 2, 1949) cert den 339 US 924 (1950), Judge Hand was describing the conventional notion of habeas corpus as it existed on the eve of a major change in the American writ:

> "It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion....The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights."

Though he could not have known it at the time, Judge Hand was already writing in the past tense; for winding its way toward the Court was a case which would revolutionize federal habeas practice -- and lay the foundation for the massive importation of constitutional claims into the Federal judicial system that would flow from yet another revolution in the American judicial system.

4.

The Slippery Slope

By 1942, reports one authority, "[a]buses of habeas corpus had become so intolerable...that the Judicial Conference of the United States" did what many Governmental agencies do when confronting a problem: they "appointed a committee to investigate and report." Collings, at 355. Congress, duly noting the Committee's recommendations, embodied some of them into the 1948 revisions of the United States Code dealing with habeas petitions, providing us with the bulk of our current statute. 62 Stat 964-968 (1948). However, the "intolerable abuses" which this revision was designed to remedy appear to have been but distant echoes, when the Court came to consider the case of Brown v Allen, 344 US 443 (1953).[33]

[33] As Justice Jackson noted in his dissent to Brown, supra at 536 n 8, the "abuses" that judges of the day found intolerable stemmed from filing ranging from

In Brown, the Court once again confronted a troublesome constitutional issue in the posture of a habeas case: one petitioner, whom North Carolina had sentenced to death, claimed that his conviction violated the Constitution because the trial cuort admitted a coerced confession into evidence, and because of racial discrimination in the selection of the grand jury that indicted him, and the petit jury that convicted him; a second petitioner raised a similar claim of racial discrimination in jury selection -- a claim which had already led North Carolina to grant him two new trials. The State furnished both petitioners with admittedly "adequate" process, and the petitioners offered no quarrel with the fairness of the state forums -- only with the result. The district court

33 Continued
the 127 habeas petitions filed in 1941 to the 543 filed in 1948 -- and the 541 filed in 1952, the year before the decision in Brown.

To see the correlation between this Court's holdings and the number of habeas filings in district court, see Appendix D.

denied the writs in both cases, with one district judge taking testimony on the question of discrimination; both courts noted that this Court had denied certiorari on direct appeal, and both concluded that the petition was without merit. Subsequently, the Fourth Circuit affirmed both cases.

On certiorari, this Court affirmed -- on grounds far different than those envisioned in the lower courts, and in language which held significance that its members well may not have realized.[34]

34 At this juncture in History -- five years after the 1948 revisions, and some eighty-six years after the 1867 statute -- we must remember that we are still a decade away from the massive restructuring of the Due Process Clause and Bill of Rights that began with the holding in Mapp v Ohio, 367 US 643 (1961). And the real impact of Brown will not be felt until the holding in Fay v Noia, ten years later.

Ironically, the Court could have resolved both questions before it merely by citing Wood v Brush, 140 US 278 (1891) and Matter of Moran, supra.

Speaking for a fractured Court, Justice Reed found harmless the lower court's consideration of the earlier denial of certiorari, holding that the same result would have followed from an examination of the state court record. But eight members of the Court -- the sole exception being Justice Jackson -- wrote or signed opinions which assumed that the function of habeas corpus was to provide review on the merits of federal claims already litigated in the state court system.[35] And while the two opinions comprising the majority split on the effect of a denial of certiorari, the opinions of the Court's controlling majority spent an ironically large portion of their discussions explaining why the state's adjudication of facts should be given a great deal of

35 Professor Bator has remarked that the Court embarked on this undertaking "without any explicit discussion of the question of jurisdiction or any apparent understanding of how radical this step was...." Bator, at 500. See also, Hart, Foreward, 73 Harv L Rev 84, 106 (1959).

weight.[36] But the crux of the decision was the Court's conclusion that, while a federal district court is free to accept the state court's factfinding and conclusions, it also had the discretion to reexamine the matter:

> "...Where the record...affords an adequate opportunity to weigh the sufficiency of the alegations and the evidence, and no unusual circumstances... are presented, a repetition of the trial is not required. However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice." Brown v Allen, supra at 463-365.

Alone among members of the Court, Justice Jackson foresaw potential problems in "giving the convict a virtual new trial before a federal court sitting without a

36 See, eg, 344 US at 457-465, 478-487 (Reed, J); 344 US at 487-488 (Burton and Clark, JJ); 344 US at 503-510 (Frankfurter, J).

jury." Ibid, at 540. Noting that the historic purpose of the writ was to "relieve detention by executive authorities without judicial trial," he viewed the Court's expansion of the writ under the "generalities of the Fourteenth Amendment" as far exceeding the Congressional grant of authority under the Habeas Corpus Act of 1867, concluding that "if Congress intended a reversal of [the] traditional concept of habeas corpus it would have said so" in the statute.[37] Ibid, at 533-534. Pointing out the Court's increasingly blurred treatment of "due process," he observed that, for the foreseeable future, the once sturdy foundations of the Fourteenth Amendment were

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37 As noted supra, pp 35-41, the term "habeas corpus" had an historical meaning familiar to members of the legal profession in 1867. If Congress had in mind extending federal judicial authority to include post-conviction review of state court criminal convictions, it is doubtful that the term "habeas corpus" would have suggested itself for inclusion in the statute: in 1867, a "writ of error" or "writ of error coram vobis" would have been the appropriate terminology. See, eg, 14 Stat 385, sec 2.

apt to be "unknown and unknowable." He predicted that "what seems established by one decision is to be unsettled by another" and worried that the Court's construction of due process would come to "be more or less swayed by contemporary intellectual fashions and political currents." Ibid, at 534. And as he saw the the Court abandoning the traditional limits of the writ of habeas corpus, he foresaw the explosion in habeas litigation that was still, at that time, years in the offing.[38]

Justice Jackson's predictions are, in many respects, remarkable for their accuracy and precision; he appears, however, to have viewed the matter as one of simple extrapolation and common sense. But because he was trying to hold back many of the consequences that have followed from this Court's reformulation of the writ, his observations ring true even today:

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38 See infra, pp 61ff.

"It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would protect the writ against abuse. Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court. We have so departed from this principle that the profession now believes that the issues we actually consider on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal.

"Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court....That reflects a difference in outlook normally found between personel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." Brown v Allen, surpa at 540 (Emphasis in original).

In keeping with his view of the history of the writ, Justice Jackson would have denied habeas relief to any petitioner raising a question which was -- or could have been -- raised on direct appeal, granting relief "only for those defects not disclosed on the record, going to the power,

legal competence or jurisdiction of the committing state court." Ibid, at 546-547. He thought that such rules would not "foreclose worthy causes but earmark them for the serious treatment they deserve."[39] Ibid, at 548. Moreover, the concept of ancillary jurisdiction, conferring upon a court of general jurisdiction the authority to entertain and decide all incidental issues pertaining to the cause before it, was well-recognized as a necessary means to vindicate a court's primary jurisdiction.[40] In his view, principles of federalism required this Court to acknowledge that "due process of law" did not guarantee

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39 The danger is, of course, that if a flood of petitions overloads the the system, it is as likely to obscure the truly meritorious cases as it is to breed cynicism on the part of all participants. As Justice Jackson noted in his dissent to Brown v Allen, supra at 537: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." Cf, Aesop, Fables, "The Shepard's Boy," 118 (Easton Press, 1979).

40 See, eg, 20 Am Jur 2d, Courts, sec 100, p 460, and cited cases.

a particular result in any given case, that its denial meant more than a disagreement among judges, and that a mere difference of opinion between courts did not constitute an unconstitutional denial of liberty:

> "Society has no interest in maintaining an unconstitutional conviction and every interest in preserving the writ of habeas corpus to nullify them when they occur. But the Constitution does not prevent the state courts from determining the facts in criminal cases. It does not make it unconstitutional for them to have a different opinion than a federal judge about the weight to be given to evidence."

Justice Jackson was, however, only a single vote, and his view did not carry the day. After Brown v Allen, supra, Federal judges would have the authority to disregard state court findings, and reach their own conclusions on the record before them.[41] Ten years later, in the wake of this Court's

41 Subsequently, following this Court's decision in Townsend v Sain, 372 US 293 (1963), Congress would amend the statute to provide for a "presumption of correctness" of state court factfinding, unless the petitioner established one of several

coming revolution in criminal practice and procedure, this would lead to a rapid and unrestrained growth in the scope of the writ, as a new and developing method of general review.[42]

5.

The Writ of Federal Error[43]

In 1961, this Court unleashed a decade of massive and unprecented change in American

41 Continued
grounds for rebutting the presumption. 89 Stat 711 (1966).

42 In 1953, Justice Jackson perceived an "intolerable abuse" of the writ by state prisoners, stemming from the scandalous total of 541 petitions filed in the year before the decision in Brown.
Ten years later, Professor Bator noted the "strains put on the federal judicial system" by the "ever increasing flood of habeas petitions from state prisoners." Bator, at 506. The "flood" of which he was speaking totalled 906 petitions, filed in 1961 -- the last year statistice were available for his paper.
As Appendix D shows, from the perspective of 1992 a description of these numbers as a "flood" seems remotely quaint.

43 Cf, Wood v Brush, 140 US 278, 286 (1891):
> "....That [the question of racial discrimination in jury selection] was a matter arising in the course of the

criminal law. In Mapp v Ohio, 367 US 643 (1961), the Court overruled nearly a century of precedent[44] to hold that the Fourteenth Amendment's due process clause required all States to observe the same restrictions that the Founders had placed upon the Federal government, and required them to adopt the same exclusionary rule that the Court had imposed on the lower Federal courts, in order to enforce the Fourth Amendment's guarantee against unreasonable searches and seizures. In Gideon v Wainwright, 372 US 335 (1963), this Court overruled Betts v Brady,

43 Continued
proceedings against the appellant, and during his trial...which the [state] trial court was entirely competent to decide, and its determination could not be reviewed...upon a writ of habeas corpus without making that writ serve the purposes of a writ of error."

44 See, inter alia, Wolf v Colorado, 338 US 25 (1949), and cited cases.
In retrospect, it seems that what followed from this Court in the 1960s in the area of criminal law and procedure flowed from the initial premise in Mapp, that "due process" was synonomous with the Bill of Rights -- except perhaps for the Second and Seventh Amendments.

316 US 455 (1942), holding that the Fourteenth Amendment imposed upon the States the duty to ensure counsel in all felony cases, even if it meant appointing counsel for the indigent. In Malloy v Hogan, 378 US 1 (1964), this Court overruled another line of cases[45] finding that the Fourteenth Amendment required States to observe the same Fifth Amendment ban on compelled self-incrimination that the Founders had placed on the central government. And in Miranda v Arizona, 384 US 436 (1966), this Court would find in the Fifth Amendment a prophylactic "right to counsel" that earlier courts had somehow overlooked.[46]

Such cases provided new and fertile grounds for exploring the relationship between citizen and state, and are a

45 Among the cases overruled were Twinning v New Jersey, 211 US 78 (1908), and Palko v Connecticutt, 302 US 319 (1937).

46 See infra, pp 87-93, for a discussion of the relationship between Miranda and habeas review.
Ironically, though his insights were cast aside in Malloy, Justice Cardozo's opinion

continuing source of controversy. But from the perspective of habeas law, and as the source of the coming influx of state criminal cases into the federal court system, the pivotal case was not Mapp, but rather this Court's holding in Fay v Noia, 372 US 391 (1963).

In Daniels v Allen, 344 US 443 (1953), a companion case to Brown v Allen, supra, this

46 Continued
in Palko contains an interesting discussion of the difference between those attributes of a legal system necessary for "fundamental fairness," and others required of the Federal government under the Bill of Rights. Of the latter -- among which he placed trial by jury, grand jury indictments, and compulsory self-incrimination -- he observed that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them, for the requirements of "due process" rest upon "a different plane of social and moral values." Palko v Connecticutt, supra at 325-326.

Three decades later, this Court would jettison the "fundamental fairness" view of due process, discovering in the Constitution a "selective incorporation" approach to due process that had been so cleverly hidden by the drafters of the Fourteenth Amendment that it had been flatly rejected by a succession of earlier courts. But see, Cooley, Constitutional Limitations 54-55 (1868) for a noted jurist's opinion on the practice of constitutional revision by judicial committee.

Court had denied relief on the grounds that the petitioner had failed to perfect his appeal, and the state court decision therefore rested upon an adequate and independent state ground. Ibid, at 486-487. In Fay v Noia, supra, this Court would confront the problem of procedural default once again, this time in the context of a confession which the State of New York conceded to be coerced. But where the Daniels Court discerned no authority to release a prisoner who had never litigated the controlling point of law on direct review, the Noia Court, speaking through Justice Brennan, looked to the "arguable illogicality of turning a rule of timing into a doctrine of forfeitures" ibid, at 426, and discerned in History a primary function for the writ in "provid[ing] a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[47] Ibid at 401-402. Thus, he

47 Justice Brennan does not address the finding of an earlier historian who,

reasoned:

> "...Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." Fay v Noia, supra at 402.[48]

The petitioner, convicted of murder in 1942, had never appealed his conviction, and the State of New York had denied him post-

47 Continued
surveying the history of the Great Writ, reported the "embarrassing discovery" that originally the writ of habeas corpus was used "not to get people out of prison but to put them in it." Jenks, The Story of Habeas Corpus, 18 Law Q Rev 64, 65 (1902), (emphasis in original), recounted in Scheidegger, "Rethinking Habeas Corpus," Criminal Justice Legal Foundation, August 1989 (Unpublished), p 1. But see, Duker, at 13-23.

48 The support Justice Brennan cited for this proposition was a Bill, introduced in the House of Commons in 1593, which never passed. See Professor Oaks' withering critique of the history and analysis contained in the holdings of Noia and Townsend v Sain, 372 US 293 (1963) in Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich L Rev 451 (1966).

conviction relief because of his failure to pursue a direct appeal. In fact, this was what led the district judge to deny him relief on the petition. But treating the Act of 1867 as establishing "a remedy almost in the nature of a removal from the state to the federal courts", ibid, at 416, Justice Brennan concluded that the "independence of the federal habeas proceedings from what has gone before" required that "conventional notions of finality in criminal litigation" could not "defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[49] Ibid, at 424. Therefore, while permitting the lower courts

49 As Mayer notes, it is unlikely that the drafters of the 1867 Act, in dealing with a writ with which they were all familiar, actually intended to adopt -- sub silentio -- procedures which were, at the

to deny relief where a petitioner had "deliberately by-passed" available state court remedies,[50] the Court made the broad holding that "the jurisdiction of the federal courts on habeas corpus is not affected by the procedural defaults incurred by the applicant during the state court proceedings." Ibid, at 438. And finding no impediment to the Court's jurisdiction, and viewing the constitutional error as clearly

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49 Continued
time, "completely unprecedented in habeas cases." Mayer, at 57. And as this Court would continue to recognize the limited nature of habeas review for another eighty years or so -- and bar review, even of litigated federal claims, that did not go to the committing court's "jurisdiction" in some sense of the word -- it is difficult to follow the thread of Justice Brennan's logic.

Of course, whatever its analytical or historical shortcomings, the opinion does make for stirring rhetoric. However, as Justice Harlan once observed, it is doubtful whether this Court should make a practice of "substitut[ing] resounding phrases for analysis." Douglas v California, 372 US 353, 361 (1963)(Harlan, J, dissenting).

50 Justice Brennan did, however, admonish lower courts against lightly finding the "intentional relinquishment" of a petitioner's state court appellate rights. Fay v Noia, supra at 439, quoting Johnson v Zerbst, supra at 464.

Curiously, Justice Brennan seems to have overlooked the language in Brown v Allen, supra at 487, holding that a petitioners "failure to use a state's available remedy, in the absence of some interference or incapacity,...bars federal habeas corpus." As he cited directly to that aspect of Brown dealing with the Petitioners Daniels in Fay v Noia, at 425-426, that this escaped his attention must cause him no small distress: it was, after all, the whole reason why the Court declined to address the Daniels' petition.

established, the Court proceeded to affirm the Second Circuit's granting of the writ. Simultaneously, the holding in Townsend v Sain, 372 US 293 (1963) established the principle that a federal court must conduct its own inquiry into the underlying facts of a habeas claim if the petitioner did not receive a "full and fair hearing" in state court.

The holding in Noia began an era of explosive growth in federal habeas

litigation.[51] Fed by the burgeoning growth in matters this Court determined to constitute "constitutional" issues,[52] state habeas filings climbed tenfold in the 1960s, from 906 in 1961 -- the year of Mapp v Ohio, supra -- to more than 9,000 in 1970. Human resources being as finite as human wisdom,

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51 See Appendix D for some collected data, and infra, pp 81-87 for a discussion of related problems.

52 As Judge Friendly notes, there was a distinct difference between the conception of the Bill of Rights prevailing in the days of Brown v Allen, supra -- which intervened to protect a defendant under the concept of due process only when the State had acted in a manner "repugnant to the conscience of mankind," Palko v Connecticut, supra at 325 -- and its conception as a "detailed Code of Criminal Procedure," which converted any claimed hearsay violation, restriction on cross-examination, disagreement over the existence of probable cause for an arrest, or careless remark by a judge or prosecutor during trial into a Holy Crusade, under the banner of Due Process. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi L Rev 142, 156-157 (1970). The net result is that few criminal cases will not involve a "constitutional" issue; and those that do not usually involve singularly witless defense attorneys -- whose ineptitude usually leads to a separate constitutional issue on appeal -- or genuinely repentent defendants.

however, it soon became apparent that the federal judicial system was not the limitless fount of justice that the new rules would require in order to process and decide the thousands of new yearly filings.[53] And before long, the effects of its earlier rulings would convince this Court that something had to change.

6.

The New Problems[54]

By the early 1970s, the growing

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53 Occasionally, this Court assisted in the process of self-inundation. See, eg, Jackson v Denno, 378 US 368 (1964) ovrlg Stein v New York, 346 US 156 (1953), and opening to habeas review all New York convictions in which a defendant had sought to argue to the jury, under procedures approved in Stein, that his confession was involuntary and thus unworthy of belief. Today, the Court has wisely chosen to limit habeas review to contemporaneous law, existing at the time of conviction and direct appeal. Teague v Lane, 489 US 288 (1989); Sawyer v Smith, ___ US ___ 110 S Ct 2822 (1990).

54 Cf, Gilder, Wealth and Poverty, 264 (1981): "[W]hen one produces an unduly complicated solution to a problem, one has not a solution but a new problem." See also, Publilius Syrus, Maxim 301: "There are some remedies worse than the disease."

caseload of habeas corpus petitions was putting such severe strains upon the capacity of the Federal judiciary[55] that this Court was forced to seek ways to deal with the flow of cases that Brown and Noia had made inevitable.[56] In McMann v Richardson, 397

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55 As Table D-2 shows, however, state habeas filings were not the only culprits at work.

56 Actually, commentators and authorities have noted that the "educational and deterrent functions" of criminal law require that "one violating the law will swiftly and certainly become subject to punishment...." Bator, at 452. See also, eg, President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, 45-47 (1967); Burger, "Annual Report on the State of the Judiciary," 66 ABA Journal 299, March 1980; Burger, "Annual Report on the State of the Judiciary," 67 ABA Journal 291, March 1981; Schneckloth v Bustamonte, 412 US 218, 255-265 (1973)(Powell, J, concurring); Harris v Reed, 489 US 255, 282-284 (1989)(Kennedy, J, dissenting); Engle v Sims, 450 US 936, 938-939 (1981)(Rehnquist, J, dissenting from cert denial)(Noting that habeas proceedings are not an "archaelogical expedition" searching for remnants of constitutional error). As Judge Friendly notes, however, such concerns are at odds with present practice -- in which a prisoner filing a habeas petition "has not reached

US 759 (1970), the Court would withhold habeas relief from petitioners who had voluntarily pleaded guilty, even if their plea stemmed from confession they wished to challenge on habeas as involuntary. In Picard v Connor, 404 US 270 (1971), this Court would hold that a petitioner who had not "fairly presented" his federal claim to the state courts had failed to exhaust his state remedies, and could not present the claim in a habeas corpus petition under 28 USC 2254(b).[57] The Court would come to disallow

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56 Continued
the end, or even the beginning of the end, but only the end of the beginning" of his efforts to challenge his conviction. Friendly, at 142 (borrowing from Churchill, Remarks at Mansion House, November 10, 1942, following the Battle of El Alamein).

57 This Court would later refine the concept in Picard, to hold that -- however "self-evident" the ramifications of particular claim may be -- in order to "exhaust" his state court remedies on a federal claim, a habeas petitioner must advance the same claim in state court as he seeks to advance in federal court. Anderson v Harless, 459 US 4 (1982). And the Court would decline to find exhaustion in cases

petitions which contained both exhausted and unexhausted claims, Rose v Lundy, 455 US 509 (1982), or which sought retroactive application of a new rule of law. Teague v Lane, 489 US 288 (1989). And the Court would find unworkable the "deliberate by-pass" standard of Fay v Noia, supra, discarding it in favor of a "cause and prejudice" standard, which would deny relief to any petitioner whose claims the state court had rejected on grounds of procedural default -- whether the default stemmed from a failure to assert the claim itself, Wainwright v Sykes, 433 US 72 (1977); Engle v Isaac, 456 US 107 (1982), or from a failure to develop an adequate factual record, Keeney v Tamayo-Reyes, ___ US ___; 51 CrL 2069 (1992) -- unless the petitioner could establish "good cause" for the default,

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57 Continued
where a habeas petitioner first presented a new claim on discretionary review to the state's highest court. Castille v Peoples, 489 US 346 (1989).

and "actual prejudice" from the alleged constitutional error. Cf, Coleman v Thompson, 501 US ___; 115 L Ed 2d 640 (1991). However, the most promising means of bringing the habeas burden of the Federal judiciary under control stems from this Court's holding in Stone v Powell, 428 US 465 (1976) -- and many problems in the area of habeas law stem from this Court's reluctance to extend the logic and application of Stone into different areas of the law.

In Stone, petitioners had duly raised Fourth Amendment claims at their state court trials -- one claiming that as the Nevada police arrested him under an unconstitutional ordinance, the murder weapon they found on his person was unlawfully seized,[58] and

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58 This Court would subsequently hold that an otherwise lawful arrest, made pursuant to an unconsitutional statute, was a reasonable seizure under the Fourth Amendment. Michigan v DeFillippo, 443 US 31 (1979).

its admission in his California trial was therefore improper; the other claiming that evidence of his involvement in a Nebraska murder seized under a warrant was unlawfully taken from his home, due to the invalidity of the search warrant.[59] While unsuccessful in state court on direct appeal, federal courts sustained their claims on habeas, ordering new trials in both cases.[60]

On certiorari, this Court reversed. Speaking for the six-member majority, Justice Powell considered the scope and purpose of the exclusionary rule: it was not, after all, a "personal constitutional right," for it was

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59 Perhaps mindful of the incongruity posed by the notion that we could encourage police to obtain search warrants by suppressing evidence seized after they actually obtained and relied upon a warrant, eight years later this Court would conclude that evidence seized in good faith reliance upon a search warrant was a reasonable search under the Fourth Amendment. United States v Leon, 468 US 897 (1984) reh den 468 1250 (1984); Massachusetts v Shepard, 468 US 981 (1984)

60 If the lower court decisions in this case are not persuasive enough on this

never intended "to redress the injury" to the person affected. Stone v Powell, supra at 486. Rather, it was "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." Ibid, quoting United States v Calandra, 414 US 338, 348 (1974). Accordingly, given its limitations, he concluded that the negligible deterrence likely to come from enforcing the rule in a collateral habeas proceeding was too speculative to justify its application. Cf, United States v Calandra, 414 US 338 (1974); Walder v United States, 347 US 62 (1954); United States v Havens, 100 S Ct 1912 (1980). It did, after all, strain credulity to assume that police officers would refrain from conducting an unlawful search because,

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60 Continued
point, perhaps the fact that the state courts in Stone reached what this Court later determined to be the correct results -- only to be overruled on habeas by the lower Federal bench -- will give pause to those who claim that the lower Federal courts possess some special insight into federal claims.

though confident they could hide a constitutional violation from a state court, they feared that federal habeas review would reveal the true state of affairs. Thus, Justice Powell saw no reason to justify inquiring into the merits of Fourth Amendment claims on habeas review:

> "....Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged cost to other values vital to a rational system of criminal justice." Stone v Powell, supra at 493-494.

Even so, the Court understood that Federal courts could still serve a valuable function in undertaking the habeas jurisdicdiction conferred by Congress. Noting that the writ of habeas corpus "will not be allowed to do service for an appeal." Stone, at 477 n 10, quoting Sunal v Large, 332 US 174, 178 (1947), the court reasoned that our notions of due process to include providing citizens with the means to challenge their detention

by the government, and that Congress had charged Federal courts with ensuring that States "provide adequate corrective process for the full and fair litigation of federal claims." Stone v Powell, supra at 476. Accordingly, while Federal courts should not relitigate Fourth Amendment claims already addressed by the State courts, this limitation presumed that states would afford defendants the chance to raise such claims directly. And so, the Court held:

> "...[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v Powell, supra at 494.

The approach Stone offers to Fourth Amendment claims displays many advantages over alternatives this Court has used in recent years: by eliminating routine de novo review, the Court conserves finite judicial resources by avoiding needless relitigation of matters already settled by the State

courts. By directing the habeas court's attention to the issue of a "full and fair hearing," the Court focuses federal attention on the true, historical attributes of "due process": a fair hearing before an unbiased tribunal, honestly applying the law of the land. Cf, Palko v Connecticut, supra at 323-328. And by acknowledging the substantial differences between a writ of error and a writ of habeas corpus, the Court has returned to its original point of departure, and seems poised to correct its mistakes of the past.

Recognizing the scope of the problem afflicting modern federal habeas review, and sensing that Stone may offer the start of a solution, some members of this Court have indicated a willingness to explore the application of Stone in other contexts. See, eg, Duckworth v Eagan, 492 US 195, 205-214 (1989)(O'Connor, J, concurring). As the instant case demonstrates what is wrong with federal habeas review today, we may now

examine the implications of such an extension, to see whether the time has come to make the move.

B.

DEFINING THE PROBLEM

From its humble beginnings as a means of compelling the attendence of recalcitrant parties, this Court has reshaped the writ of habeas corpus until it is unrecognizable. Far from the legal writ of Blackstone and Coke, the modern writ bears no resemblance to its place or function throughout History: it is now rarely used in England, since the advent of direct appeal rendered it largely obsolete, Wilkes, at 57-59, and the writ today is clearly different -- in operation, as well as scope -- than the writ Congress authorized in 1867. The Court's gradual eviseration of the jurisdictional limitation on federal habeas inquiries, Frank v Magnum, supra, rejection of limits on the power of de novo federal review, Brown v Allen, supra,

and full scale application of the Bill of Rights to the states under the rubric of "due process," see, eg, Mapp v Ohio, supra, have altered the legal landscape to make the modern writ as much a source of mischief as protection. Many routine matters of practice and procedure are now thought to be matters touching upon the "constitution or laws...of the United States," 28 USC 2254(a), and burden Federal courts with issues raised and decided in the due course of state criminal proceedings. This has converted the writ of habeas corpus into nothing more than a writ of federal error, entitling convicted state prisoners to obtain a second review of issues already litigated on direct appeal.[61]

61 Actually, this "second chance" is probably more important to a criminal defendant than many courts realize: While frivolous claims will likely be denied by any competent judge, there are many claims about which there will be honest differences of opinion. Yet if the State must succeed in multiple forums to prevail, a defendant's

However, in this new role the Great Writ has carried its historical baggage with it: the "familiar principle that res judicata is inapplicable in habeas proceedings," Fay v Noia, supra at 423 made sense in the days when the writ only examined the jurisdiction of the committing court. But extending the reach of the writ without altering its scope has transformed the writ into a juridical Frankenstein monster, which is threatening to turn upon the Society which created it.

61 Continued
chances of winning his case despite his own undisputed guilt increase markedly.

Suppose, for example, we have a challenged confession, providing the only significant evidence linking a defendant to a murder. Assuming a weak but not insubstantial claim of some violation or other -- a Miranda defect, perhaps -- a defendant may have, let us say, one chance in three of convincing a particular judge that his particular confession should be suppressed. Aside from question of credibility, the court's resolution of the matter will, of course, depend upon the judge's resolution of the matter of custody.

In the state court, the Prosecutor will have a 67% chance of prevailing. Given normal standards of review, the trial court will see its ruling affirmed on appeal. Assuming that any ensuing error-free trial results in a conviction -- no small assumption, considering the limitations on

This Court has forgotten the roots of habeas corpus, and the Writ's broad expansion in the wake of Mapp v Ohio, supra has cheapened the ancient and noble heritage that earned it an honored place in Anglo-American history.

We see that a massive duplication of effort was never part of the writ's history, or Congressional intent. This facet of the modern writ stems from the Court's abandonment of Justice Cardozo's formulation of "due process" Palko v Connecticut, supra at 325-326, in favor of a "constitutional

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61 Continued
human wisdom and the unpredictability of jurors -- the State's chances of winning an affirmed conviction are defined by the probability of winning the suppression motion.

However, if the State must relitigate the matter on habeas, that same 67% chance will be further reduced by the one chance in three that the federal judge will resolve the issues in the petitioner's favor. Therefore, the State's true chance of prevailing in both forums is 45% [ie, P(AB) = p(A)p(B), ergo P = (.67)(.67) = 0.4489]; and since the defendant need only win once, his odds of riding a longshot suppression motion to victory would make him the betting favorite in Las Vegas.

shoehorn" approach, by which the Court justifies enforcement of the Bill of Rights guarantees upon the states through the Due Process Clause of the Fourteenth Amendment. But the Court has never questioned its exportation of "due process" from its function as a tool of incorporation into other areas of the law, nor questioned the effect of modern "due process" on statutory language which predated the holding in Mapp v Ohio, supra: the Court has never, for example, questioned whether Congress, at the time of the 1867 Habeas Act, really intended such a wide scope for habeas review -- or if its inability to forsee the holding in Mapp, and the many other means available at the time for creating a federal writ of error,[62] might not indicate a flaw in the

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62 See, eg, The Federalist, No. 81. In any case, Congress saw fit to vest this Court with the jurisdiction to review state tribunals on writ of certiorari, thereby settling the point. 28 USC 1257. See also, 14 Stat 385, sec 2.

Court's reasoning.[63] And lost somewhere in the mountains of annual habeas filings is any concern about Justice, about a petitioner's actual guilt or innocence, or about the proper allocation of judicial responsibilities between the States and the Federal government.

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63 Actually, at least one attorney has wondered whether we might not trace much of the volatility in modern law to the replacement of traditional modes of construction -- eg, construing the Constitution by actually reading the document -- with the modern method: construing the cases which construe the Constitution, then construing those cases which construe the cases which construe the Constitution, and so on ad infinitum. Cf, Minnick v Mississippi, 498 US ___; 111 S Ct 486 (1990)(Scalia, J, dissenting)(Noting the "vertitable fairyland castle of imagined constitutional restrictions" stemming from the practice of building prophylaxis upon prophylaxis).

For those constantly seeking New Horizons in Constitutional Adjudication, the modern approach has the advantage of raising an infinite number of new questions with each case decided. But it reminds counsel of the fabled story whispered from ear to ear around a table: by the time it makes it all the way around, it usually bears little resemblance to the original message; and what starts out as a simple statement ("I don't like beets") is apt to return as

Stating a problem, however, is easier than solving it. And unless we wish to repeat the mistakes of the past four decades, we should not undertake any major steps without first assuring ourselves that our efforts will not simply make matters worse.

C.

A TALE OF TWO PARADIGMS

Applying the lessons of Stone v Powell, supra to the facts of this case will take us to a fork in the legal road: as Respondent raised only a Miranda claim in his state appeal and the instant Petition,[64] this Court need only address the application of

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63 Continued
something completely different ("That idiot Caminsky beat up his spinster Aunt Matilda for eloping with an Australian sheep rancher").

We can see how this approach has altered our conception of habeas corpus; we can only imagine what another generation or two of "round the table" construction will do to the actual Constitution.

64 Miranda v Arizona, 384 US 436 (1966). See, eg, Defendant-Appellant's Brief on Appeal and Defendant-Appellant's Application

Stone to claims of Miranda-defective confessions to decide the case. On the other hand, as the District Court based its decision on the purported involuntariness of Respondent's statement, (Petition, 84a-85a), and the Sixth Circuit also proceeded to consider the voluntariness of the statement, (Petition, 13a n 1, 16a-24a), this Court may wish to consider applying Stone to the full range of Fifth Amendment claims.

While the concerns of Stone resonate across the full scope of habeas review, however, applying its lessons in differing contexts may require a difference in approach: the prophylactic concerns of Miranda are, after all, different than those at the heart of the Fifth Amendment. And although extending Stone to Miranda is an excercise in elemental logic, applying Stone across the full breadth of the Fifth

64 Continued
for Leave to Appeal, 6thCirJA, 66a-111a, 127a-182a.
See also the Petition for Writ of Habeas Corpus, in this matter, Ibid, 6a-12a.

Amendment would require a fundamental change in outlook, altering the range of concerns relevant to a habeas petition.

Therefore, let us examine each possibility in turn, to see whether either approach warrants this Court's adoption.

1.

WHEN A HABEAS PETITIONER HAS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE A MIRANDA CLAIM IN STATE COURT, THE RULE IN STONE v POWELL BARS RELITIGATING THE POINT IN A FEDERAL HABEAS PROCEEDING.

In Stone v Powell, supra, the Court noted that the exclusionary rule was not a "personal constitutional right," but was a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect...." Ibid, at 486, citing United States v Calandra, 414 US 338, 348 (1974); see also, Linkletter v Walker, 381 US 618 (1965). Thus, as a prophylactic rule, the exclusionary remedy carries costs that often exceed the

legitimate Fourth Amendment interests at stake. Stone v Powell, at 490-491; see also, 428 US 496-502 (Burger, CJ, concurring), Schneckloth v Bustamonte, supra at 266-274 (Powell, J, concurring). Given the compelling state interest in detecting and punishing crime, cf, Alderman v United States, 394 US 165, 174-175 (1969), the Court noted the "costs of applying the exclusionary rule," Stone v Powell, supra at 489, and sought to apply it only in "those areas where its remedial objects are thought most efficaciously served." Ibid, at 486-487, quoting Calandra, at 348. Therefore, given the speculative nature of any deterrence flowing from an exclusionary rule applied on collateral attack, and the undeniably reliable evidence that would be kept from the fact-finder on retrial, the Court concluded that fully-litigated Fourth Amendment claims could not support a claim for relief on habeas review. Stone v Powell, at 492-496.

Applying this analysis to Miranda claims, the result should be the same: like the Fourth Amendment's exclusionary rule, Miranda is a prophylactic rule that over-protects the Fifth Amendment interests it is designed to serve. Michigan v Tucker, 417 US 433 (1974), Oregon v Elstad, 470 US 298, 306-310 (1985); cf, Harris v New York, 401 US 222 (1971). See also, Duckworth v Eagan, 492 US 195, 208-210(1989) (O'Connor, J, concurring). Moreover, like evidence seized in violation of the Fourth Amendment, voluntary confessions are reliable evidence of a defendant's guilt, which "significantly contribute to the certitude with which we may believe the accused is guilty." Miranda v Arizona, supra at 538 (White, J, dissenting). It follows that, as the concerns underlying Fourth Amendment claims on habeas are identical to those involving Miranda defects, a habeas court's treatment of the two claims should be the same: and as fully-litigated Fourth Amendment claims

provide no basis for relief on habeas, a fully-litigated Miranda claim should provide none, either.

Even so, there is a more basic reason why Miranda claims give a habeas court no basis for granting relief: such relief is simply beyond the jurisdiction of the Federal court. The Habeas Act provides, after all, that applications for relief are proper only "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC 2254(a). But this Court has recognized that the Miranda rules "were not themselves rights protected by the Constitution but were instead measures to insure that the [constitutional] right against compulsory self-incrimination was protected," Michigan v Tucker, supra at 444; Miranda v Arizona, supra at 467. It follows, that a habeas petition alleging a Miranda defect does not claim that the petitioner's imprisonment is "in violation of the Constitution...of the

United States." And as Congress has passed no law -- nor ratified any treaty -- adopting the Miranda rules as a matter of national policy, Miranda claims are simply not covered by the habeas statute,[65] and under 28 USC 2254(a) a federal court has no jurisdiction to grant a state prisoner any relief on this basis.

Applying the rule to this case, we see that the only federal issue properly before the district court concerned Respondent's claim that the police violated his rights under Miranda; accordingly, he has stated no grounds for relief, and the district judge should have dismissed the petition.

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65 This also suggests that the Court exceeded its constitutional authority under Article III of the Constitution in the Miranda case. For a critical examination into the questionable constitutional underpinnings of the Miranda holding, see, Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW U L Rev 100 (1985), and Caminsky, A Challenge to Miranda, 14 Search & Seizure L Rept 145 (1987).

2.

WHEN A HABEAS PETITIONER HAS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE A FIFTH AMENDMENT CLAIM IN STATE COURT, THE RULE IN STONE v POWELL BARS RELITIGATING THE POINT IN A FEDERAL HABEAS PROCEEDING.

We have seen that many of the problems with federal habeas review stem from the problem of relitigation. Once properly preserved, under Brown v Allen, supra a federal court is free to undertake a review on the merits, subject only to a "presumption of correctness" owed the state court's factual findings.[66] 28 USC 2254(d). Sumner v Mata, 455 US 591 (1982). And given the multiplicity of rights this Court has constitutionalized in the wake of Mapp v Ohio,

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66 Actually, the district court ruling in this case demonstrates exactly how meaningless such a presumption can be: the district judge did not cite the state court's opinion -- and, by proceeding to hold involuntary statements that the state judge had suppressed on grounds that the police lacked probable cause to arrest him, see Petition, pp 90a-91a, demonstrated a singular lack of awareness concerning the findings that she was presuming correct.

supra, a defendant's ability to relitigate any federal issue arising in the course of his prosecution places most routine points of criminal procedure within the ultimate scope of Federal review.

However, while Stone v Powell, stems from the post-Mapp era, its language recalls earlier holdings of this Court, concerning the proper scope of habeas review. It is, upon reflection, the modern analogue of cases such as Mangum, Moore, and Ex parte Hawk, all of which recognized that an adequate "corrective process" was all that the "due process" under the "Constitution or laws of the United States" required, and that the federal courts on habeas corpus had no authority to relitigate most points decided in a state court -- even points decided incorrectly -- so long as the State afforded its defendant a full and fair hearing of the matter.

Viewed from the perspective of History, Brown v Allen, supra clearly overstates both the Federal interest, and the federal rights at stake in a habeas corpus proceeding. There is, after all, no Federal interest in relitigation; neither is there a Federal interest in extending the length of state criminal proceedings, or in burdening the Federal judiciary with routine oversight of state court criminal prosecutions. On the other hand, each citizen has an interest in due process -- in the fairness of our courts, and in the undisturbed enjoyment of our rights as citizens unless and until the State can establish guilt of some criminal offense.

But this basic interest in fair procedures is not the same as the "due process" concerns that prompted this Court to recast the Bill of Rights as "a detailed Code of Criminal Procedure," Friendly, at 156: those concerns were, for the most part, substantive in nature, concerned with the content of the

right, not its application. Thus, even as we may debate the wisdom of various readings of the substantive content of the Constitution, the true Federal interest in "due process of law" is the same today as it has always been: ensuring a fair hearing, before a competent and unbiased tribunal applying the law of the land. While this Court has recast the content of many of our rights, the habeas statute has never required the Court to give a litigant multiple forums for contesting a point of law: habeas corpus is, after all, a writ of limited application, not a writ of error. Wood v Brush, supra; Frank v Mangum, supra; Moore v Dempsey, supra. Therefore, applying the rule in Stone v Powell, supra to all claimed violations of the Fifth Amendment[67] would merely return habeas corpus to its in-

[67] As noted above, there is a legitimate basis for distinguishing between Miranda claims, and violations of the Fifth Amendment: Miranda claims stem from alleged violations of a prophylactic rule, not from violations of the Constitution. Accordingly, if this Court extends the rule

tended and historic function in our federal system; it would, however, require this Court to overrule the holding in Brown v Allen, supra, restoring the formulation the Court last expressed in Ex parte Hawk, supra, at 118, nine years earlier:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or delined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, or because in the particular case the remedy...proves in practice unavailable or seriously inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless." (Citations omitted).

Returning to such a rule would require this Court to rearticulate the basic goals and limitations of habeas review; more im-

67 Continued
in Stone to include all Fifth Amendment claims, it could do so only by extending it to include all claimed violations of the Constitution.

portantly, it would alter present practice in many meaningful ways. As these changes would be entirely consistent with the language and purpose of the Statute, they need no further authorization by Congress; and as they would be entirely beneficial to the system of habeas review, they should present no impediment to this Court's adoption, if convinced that such changes are within this Court's constitutional prerogatives.[68] In any case, the resulting system of habeas review should operate in the following manner:

(1) The proper subjects for challenge on federal habeas review are whether a pet-

68 As Colling, at 355, and others have noted, see, eg, LaFave & Israel, at 292-297, the statute itself has remained largely unchanged since 1867: the only changes have sought to limit this Court's power, by codifying rules relating to exhaustion, factfinding, and the admission into evidence of certified copies of prior state court findings and opinions.This Court itself is the source of any expansion of the scope of habeas review that has taken place, and any of the ensuing problems; accordingly, this Court may properly look to itself to correct any mistakes it has made in the past.

titioner received due process of law -- or, in other words, whether he had a full and fair hearing on a contested federal claim, before a competent tribunal charged with applying the law of the land. The proper scope of federal inquiry is the fundamental fairness of the proceedings, and the jurisdiction of the committing court; any other issue settled on direct review is the "law of the case," and affords, rather than denies, due process of law.

(2) Absent a showing of "cause and prejudice", a petitioner who has failed to raise a federal claim in his state court proceeding has shown no denial of a "full and fair opportunity" to litigate the point on direct review, and has failed to exhaust his state remedies. Accordingly, habeas review would be unavailable. 28 USC 2254(b); Wainwright v Sykes, supra; Keenan v Tamayo-Reyes, supra.

(3) A petitioner who has properly raised and fully litigated a substantive federal

claim in his state court proceeding has had a "full and fair hearing" on the issue, and may not relitigate the point on federal habeas review. 28 USC 2254(d); Stone v Powell, supra; Ex parte Hawk, supra.

(4) A habeas petitioner showing the denial of a "full and fair" opportunity to litigate a relevant point of federal constitutional law will invoke the jurisdiction of the habeas court; a showing of "cause and prejudice" for failing to raise an apparently meritorious federal claim will suffice to demonstrate the denial of a "full and fair opportunity" to litigate the point in the state court proceeding. Likewise, a showing of the committing court's lack of jurisdiction -- either over the person or the subject matter -- will invoke the jurisdiction of the habeas court.

(5) A habeas petitioner demonstrating that the committing court lacked jurisdiction will be entitled to his immediate discharge from state custody.

(6) A habeas petitioner demonstrating a denial of a "full and fair opportunity" for litigation of an apparently meritorious federal claim is also entitled to relief; however, the habeas court should have the discretion needed to grant relief reasonably appropriate to remedy the harm suffered.

(7) To conserve the resources of the federal judiciary, and further the interests of federalism and comity, a habeas court concluding that a State denied the petitioner a "full and fair opportunity" to raise an apparently meritorious federal claim should remedy the harm suffered by the means least intrusive upon legitmate State interests, and most likely to vindicate the petitioner's own legitimate interests. Ordinarily, this will entail an order noting the denial of a fair hearing, directing the State courts to grant such a hearing, and issuing a writ conditionally granting a new trial in the event that the State does not afford such a hear-

ing. 28 USC 2243 (Authorizing the court to "hear and determine the facts, and dispose of the matter as law and justice require").

(8) In the rare case leading a habeas court to conclude that the State is unable or unwilling to provide a petitioner with due process of law, the court may conduct a full hearing on the merits of the petitioner's claim, and issue the appropriate order. Ibid; 28 USC 2254(d)-(e).

Structuring habeas review in this manner would return the Federal judiciary to the scope and practice of habeas review as it existed at the time of the 1948 revisions of the original 1867 statute. It would be simpler, and easier to administer than the unwieldy, unauthorized "writ of federal error" that we presently call habeas corpus, and channel judicial resources in more productive ways. Most of all, however, this mode of habeas review recognizes what earlier

courts realized, and later Courts seem to have forgotten: the best designed systems are largely self-correcting; a reversal of any court's judgment shows not that the system is working, but that it is malfunctioning in some way; and when the judicial system is performing properly, habeas relief will never be necessary.

If we apply these rules to the instant case, it is clear that Respondent has stated no grounds for relief: to the extent that he properly presented his Miranda claim to the State courts, he has already fully litigated the matter, making resolution of the issue the law of the case, and beyond the proper scope of habeas review; to the extent that the district court considered matters outside those issues duly raised on direct appeal, Respondent not exhausted his state remedies, requiring the dismissal of his petition. In either case, Petitioner has not shown that the State denied him a "full and fair opportunity" to litigate the point in

State court, rendering his habeas claim meritless.

D.

CONCLUSION

> **"Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by its current excesses."**
>
> Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, U Chi L Rev 143, 144 (1970).

As a symbol of Liberty and a tool of Freedom, the writ of habeas corpus richly deserves its honored place in our legal heritage. A bulwark against arbitrary detention, its service as a Guarantor of due process is measured in centuries. And if we look at our legal system from the perspective of History, we see evidence of the Great Writ at every turn:

The battles between Parliament and the Crown, and between the Crown and the Colonists, showed our Founders the danger of

concentrated and despotic power. Darnel's Case demonstrated that judges who could not question the word of the Executive could not protect the powerless from tyranny. This aspect of the Writ is now found in our constitutional doctrine of the separation of powers, and in the Fourth Amendment's guarantee against unreasonable searches and seizures.

The Writ brought the prisoner into court, subjecting him to the protection -- and the power -- of the magistrate. Today, we call this "due process of law," and hear its echoes in the bail provisons of the Eighth Amendment.

In early England, the Writ was often the only means by which subjects could bring their case to a judge, and have any charges against them resolved quickly, and according to the law. This facet of the Writ now has its home in the Speedy Trial Clause of the Sixth Amendment.

Though the Writ has all but disappeared in modern England, we see vestiges in the English and American institutions of appellate review, and our conceptions of "inferior" and "superior" tribunals. And if we were to erase the term from our collective memories, we could not dim its influence on our ideas of fairness, or mercy, or justice.

We should not be afraid of looking to the past, as well as the future -- or consulting our History, as well as our ideals. If we mean to preserve the writ of habeas corpus as a living part of our jurisprudence, we cannot mistake it for a Holy Relic -- nor transform it by magic into something it is not. And if we mislead ourselves into thinking that the Writ is a gift from God, bestowing grace on all who invoke its name, we only sully its legacy with misuse, and invite the contempt of those who would abuse it.

That the modern writ bears no resemblance to the Great Writ of history is an unfortunate, but undeniable fact of our

current legal system. Its replacement with the modern "writ of federal error" has transformed it from a lasting bulwark against oppression into a forum for perpetual appeal, cheapening its legacy even as it renders it ever less likely that its protection will be there for those who really need it. But as it was this Court which first undertook the departure, returning the writ to its proper place is within this Court's power, and restoring the writ to beneficial use on behalf of all Americans would be an honorable legacy for this Court to leave to future generations. In the final analysis, the writ of habeas corpus, like the Constitution itself, does not belong only to criminals; it belongs to all of us.

II.

AN ISSUE IS NOT "FULLY AND FAIRLY" PRESENTED FOR STATE COURT REVIEW WHEN THE DECISIVE ASPECT OF THE ISSUE IS RAISED NEITHER IN STATE COURT NOR IN A PETITION FOR COLLATERAL RELIEF, BUT FIRST APPEARS IN THE DISTRICT COURT'S OPINION GRANTING FEDERAL HABEAS RELIEF.

See supra, note 2.

III.

A CONFESSION IS NOT INVOLUNTARY MERELY BECAUSE INDUCED BY THE POSSIBILITY OF FUTURE LENIENCY; AND RELIEF ON SUCH GROUNDS IS PRECLUDED ON COLLATERAL REVIEW UNDER TEAGUE v LANE, 489 US 288 (1989) and SAWYER v SMITH, ___ US ___; 110 S Ct 2822 (1990).

See supra, note 3.

RELIEF

WHEREFORE, Petitioner prays that this Court reverse the holding of the Sixth Circuit Court of Appeals, and reinstate Respondent's state court conviction for first-degree murder.

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Dated: June 4, 1992

JC/eb

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APPENDIX A

Text of Relevant Constitutional Provisions

1.

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2.

Constitution of the United States, Amendment XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Text of Relevant Statutory Provisions

28 USC 2241 et seq

2241. POWER TO GRANT WRIT

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to

the district court having jurisdiction to entertain it.

(c) The Writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption

claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him to court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of

justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, ch 646, 62 Stat. 964; May 24, 1949, ch. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub. L. 89-590, 80 Stat. 811)

2242. APPLICATION

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit court judge it

shall state the reasons for not making application to the district court of the district in which the applicant is held.
(June 25, 1948, ch. 646, 62 Stat. 965).

2243. ISSUANCE OF WRIT; RETURN; HEARING; DECISION

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless is appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause

additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.
(June 25, 1948, ch. 646 62 Stat. 965).

2244. FINALITY OF DETERMINATION

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instances of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a

Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appeal in such record by the exercise of reasonable diligence.

(June 25, 1948, ch. 646, 62 Stat. 965; Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104.)

2245. CERTIFICATE OF TRIAL JUDGE ADMISSIBLE IN EVIDENCE

On the hearing of an application for a write of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who preside at the trial resulting in the judgment, setting forth the facts

occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966).

2246. EVIDENCE; DEPOSITIONS; AFFIDAVITS

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 State. 966).

2247. DOCUMENTARY EVIDENCE

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, ch. 646, 62 Stat. 966).

2248. RETURN OR ANSWER; CONCLUSIVENESS

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, ch. 646, 62 Stat. 966).

2249. CERTIFIED COPIES OF INDICTMENT, PLEA AND JUDGMENT; DUTY OF RESPONDENT

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to the answer to the order to show cause.

(June 25, 1948, ch. 646, 62 Stat. 966).

2250. INDIGENT PETITIONER ENTITLED TO DOCUMENTS WITHOUT COST

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of

any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his officer as may be required by order of the judge before whom the application is pending.

(June 25, 1948, ch. 646, 62 Stat. 966).

2251. STAY OF STATE COURT PROCEEDINGS

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or

under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, ch. 646, 62 Stat. 966).

2252. NOTICE

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such States as the justice or judge at the time of issuing the write shall direct.

(June 25, 1948, ch. 646, 62 Stat. 967.)

2253. APPEAL

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

(June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch. 139 § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 St. 727).

2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the united States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction if the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceedings in the Federal court, when due proof of such factual determination has been been, unless the existence of one or more the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent,

or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall

determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the Stated court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105).

2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence was in excess of the maximum authorized by law, or

is otherwise subject to collateral attack, may move the court which imposed thee sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch 139, § 114, 63 Stat. 105)

APPENDIX C

Historical Materials

1.

From Coke, Second Part of the Institutes of the Laws of England 51-54 (1642):

* * *

Now here it is to be knowne, in what cases a man by the law of the land, may be taken, arrested, attached or imprisoned in case of treason or felony, before presentment, indictment, &c. Wherein it is to be understood, that processe of law is two fold, viz. By the kings writ, or by due proceeding, and warrant, either in deed, or in law without writ.

As first, where there is any witnesse against the offendor, he may be taken and arrested by lawful warrant, and committed to prison.

When treason and felony is committed, and the common fame and voice is, that A. is guilty, it is lawfull for any man, that suspects him, to apprehend him.

This fame Bracton describeth well, **fame quae suspicionnem inducit, oriri debet apud bonos, et graves, non quidem malevolos, et maledicos, sed providas et fide dignas personas, non semet,sed saepius, quia clamor minmit, et defamatio manifestat.**

So it is of hue and cry, and that is by the statute of Winchester, which is but an affirmance of the common law: likewise if A. be suspected, and he fleeth, or hideth himselfe, it is a good cause to arrest him.

If treason or felony be done, and one hath just cause of suspition, this is a good cause, and warrant in law, for him to arrest any man, but he must shew in certainty the cause of his suspition: and whether the suspition be just, or lawfull, shall be

determined by the justices in an action of false imprisonment brought by the party grieved, or upon a habeas corpus, &c.

A felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be by a warrant in law, attached and imprisoned by the law of the land.

A watchman may arrest a night walker by a warrant in law.

If a man woundeth another dangerously, any man may arrest him by a warrant in law, until it may be known, whether the party wounded shall die thereof, or no.

If a man keep the company of a notorious thiefe, whereby he is suspected, &c. it is a good cause, and a warrant in law to arrest him.

If an affray be made to the breach of the kings peace, any man may by a warrant in law restrain any of the offenders, to the end the kings peace may be kept, but after the affray ended, they cannot be arrested without an expresse warrant.

See now the statutes of 1 & 2 Phil. & Mar. cap. 13. & 2 & 3 Phil. & Mar. cap. to.

Now seeing that no man can be taken, arrested, attached, or imprisoned but by due processe of law, and according to the law of the land, these conclusions hereupon doe follow.

First, that a commitment by lawfull warrant, either in deed or in law, is accounted in law due processe or proceeding of law, and by the law of the land, as well as by processe by force of the kings writ.

2. That he or they, which doe commit them, have lawfull authority.

3. That his warrant, or mittimus be lawfull, and that must be in writing under his hand and seale.

4. The cause must be contained in the warrant, as for treason, felony, &c. or for suspition of treason or felony, &c. otherwise if the mittimus contain no cause at all, if the prisoner escape, it is no offense at all, whereas if the mittimus contained the cause, the escape were treason, or felony, though he were not guilty of the offence; and therefore for the kings benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause.

5. The warrant or mittimus containing a lawfull cause, ought to have a lawfull conclusion, viz. and him safely to keep,

untill he be delivered by law, &c. and not untill the party committing doth further order. And this doth evidently appeare by the writs of habeas corpus, both in the kings bench, and common pleas, eschequer and chancery.

Rex vicecom. London. Saolutem. Praecipimus vobis, quod corpus A.B. in custodia vestra detent.ut dicitur, una cum causa detentionis fuce, quocunq; nomine praed. A.B. cenfeatur in eifdem, habeatis coram nobis apud Wesim. die 'Joviis prox' poft octabis S. Martini, ad fubjiciend. et recipiend. ea, quce curia nofta de eo adtunc, et ibidem orrdinari. contigerit in bac parie, et bac hoc nullatenus omittatis, periculo incumbente, et habeatis ibi hoc breve, teste Edrv. Coke 20 Nov. anno regni nostri 10.

This is the usuall forme of the writ of habeas corpus in the kings bench, vide Mich.

5 E. 4 Rot. 143. coram Rege, Kefars case, under the teste of Sir. John Markham.

Rex vicecom. London. Salutem. Praecipimus vobis, quod habeatis coram justiciariis nostris, apud Wesim. die 'Jovis prox' post quinque septiman. Pafche, corpus A. B. quocunque nomine censcatur, in prisona vestra, fub custodia vestra detent.ut dicitur, una cum die, et causa captionis et detentionis ejusalem, ut iidem justiciar. nostri, visa causa illa, ulterius fieri fac', quad de jure, et jecundum legen, et consuetudinem regni nostri Angliac for et saciend. et habeatis ibi hoc breve, teste, &c.

The like writ is to be graunted out of the chancery, either in the time of the erme (as in the kings bench) or in the vacation; for the court of chancery is officina justitiae, and is ever open, and never adjourned, so as the subject being

wrongfully imprisoned, may have justice for the liberty of his person as well in the vacation time, as in the terme.

By these writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these words ad **subjiciend. et recipiend. &c.** prove that cause must be shewed: for otherwise how can the court take order therein according to law?

And this doth agree with that which is said in the holy history, **Sine ratione mibi videtur, mittere vinctum in carcerem, et causas ejus non significare.** But since we wrote these things, and passed over to many other acts of parliament; see now the petition of right; **anno tertio Caroli regis,** resolved in full parliament by the king, the lords spirituall, and temporall, and the commons, which hath made an end of this question, if any were.

Imprisonment doth not onely extend to false imprisonment, and unjust, but for detaining of the prisoner longer then he ought, where he was at the first lawfully imprisoned.

If the kings writ come to the sheriffe, to deliver the prisoner, if he detain him, this detaining is an imprisonment against the law of the land: if a man be in prison, a warrant cannot be made to the gaoler to deliver the prisoner to the custody of any person unknown to the gaoler, for two causes; first, for that thereby the kings writ of habeas corpus, or delivery, might be prevented. 2. The mittimus ought to bee, as hath beene said, till hee bee delivered by law.

If the sheriffe, or gaoler detain a prisoner in the gaole after his acquitall, unless it be for his fees, this is false imprisonment.

In many cases a man may be by the law of the land taken, and imprisoned, by force of the kings writ upon a suggestion made.

Against those that attempt to subvert, and enervate the kings **ad capiendum impagnatores juris regis, et ad ducendum ecs ad gaolam de Newgate**; which you may reade in the Register at large. **Ubi supra.** And this is **lex terrae**, by processe of law, to take a man without answer, of summons in this case: and the reason is, **merito beneficium legis amittit, qui legem ipsam subvertere intendit.**

If a souldier after wages received, or prest money taken, doth absent himself, or depart from the kings service; upon the certificate thereof of the captain into the chancery, there lieth a writ to the kings of serjeants at armes, if the part be vagrant, and hideth himselfe, **ad capitenduum conductos proficiscend. in obsequium**

nostrum, &c. qui ad dictum obsequum nostrum venire non curavenint. And this is **lex terrae**, by processe of law, **pro defensione regis, et regni**, or for the same cause, a writ may be directed to the sheriffe, **de arrestando ipsum; qui pecuniam receipt ad prosiciscendum in obsequium regis, et non est profectus.**

If a man had entered into religion, and was professed, and after he departed from his house, and because vagrant in the country against the rules of his religion, upon the certificate of the abbot, or prior thereof into the chancery, a writ should be directed to the sheriffe, **de apostata capiendo**, whereby he was commanded in these words; **praecipimus tibi quad praefatum, &c. fine dilatione arrestes, et praefat. abbat. &c. liberes secundum regulam ordinis sui caftigand"**; and this was **lex terrae**, by processe of law, **in bonorem religionis.**

If any lay men with force and strong hand, doe enter upon, or keep the possession either of the church, or of any of the houses, or glebe, &c. belonging thereunto, the incumbent upon certificate may have a writ to the sheriffe, de vi laica amovenda, by which the vim laicam feuu armatam, quuefe tenet in dicla ecclesia, seu domibus eidem annexis, and pacem nostram in com. tuo perturband. fine dilatione amoveas; et fi quos in hac parte refistentes inveneris, eos per corpora sua attachias, et in prisona nostra jalvo custodias, &c. and this is is lex terrae, by processe of law, pro pace ecclesiae.

Also a writ of ne exeas regnum may be awarded to the sheriffe, or justices of peace, or to both, that a man of the church shall not depart the realme....And there is another writ in the Register directed to the party either of the clergy or laity. And this is lex terrae, by process of law, pro

bono publico regis et regni; whereof you may reade more at large in the third part of the Inftitutes, cap. Fugitives.

Upon a surmise that a man is a leper, one that hath morbum elephantiacum, so called, because he hath a skin like to an elephant, there may be a writ directed to the sheriffe, quia accepimus quod I. de N. leprofus existit, et inter homines comitatus tui communiter converfatur, &c. ad grave damnum homin' praed. et propter contagionem morbi praed. periculum manifestum. &c. tibi praeciptimus quod assumptis tecum aliquibus difcretis et legalibus hominibus de comitat. praed. nonsuspect', &c. ad ipsum I. accedas, &c. et examines, &c. et fi ipfum leprofum inveneris, ut praedict' est, tunc ipsum honestiori modo, quo poteris a communione hominum praedict' amoveri, et fe ad locum solitarium ad habitand' ibidem, prout moris est, transferre facias indilate, &c. And this is lex terrae, by processe of law, for

saving of the people from contagion and infection.

But if any man by colour of any authority, where he hath not any in that particular case, arrest, or imprison any man, or cause him to be arrested, or imprisoned, this is against this act, and it is most hatefull, when it is done by countenance of justice.

King Edw. 6 did incorporate the town of S. Albons, and granted to them to make ordinances, &c. they made an ordinance upon paine of imprisonment, and it was adjudged to be against this statute of **Magna Charta**; so it is, if such an ordinance had been contained in the patent it selfe.

All commissions that are consonant to this act, are, as hath been said. **fecundum legen, et confuetudinem Angliae.**

A commission was made under the great seale to take I.N. (a notorious felon) and to selle his lands, and goods: this was resolved to be against the law of the land, unlesse he had been endicted, or appealed by the party, or by other due processe of law.

It is enacted, if any man be arrested, or imprisoned against the forme of this great charter, that he bee brought to his answer, and have right.

No man to be arrested, or imprisoned contrary to the forme of the great charter.

* * *

Now it may be demanded, if a man be taken, or committed to prison **contra legem terrae**, against the law of the land, what remedy hath the party aggrieved? To this it is answered: first, that every act of parliament made against any injury, mischiefe, or grievance doth either

espressly, or impliedly give a remedy to the party wronged, or grieved: as in many of the chapters of this great charter doth appeareth; and therefore he may have an action grounded upon this great charter. As taking one example for many, and that in a powerfull, and a late time. Pasch. 2 H. 8 **coram rege** rot. 538 against the prior of S. Oswin in Northumberland. And it is provided, and declared by the statute of 36 E. 3 that if any man feeleth himselfe grieved, contrary to any article in any statute, he shall have present remedy in chancery (that is, by originall writ) by force of the said articles and statutes.

2. He may cause him to be indicted upon this statute at the kings suite, whereof you may see a precedent Pasch 3 H. 8. 8 Rogg. 71 **coram rege**. Rob Sheffields case.

3. He may have an **habeas corpus** out of the kings bench or chancery, though there be

no priviledge, &c. or in the court of common pleas, or eschequer, for any officer or priviledged person there; upon which writ the gaoler must retourne, by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just, and lawfull, he shall be remaunded to the former goaler [sic], but if it shall appeare to the court, that he was imprisoned against the law of the land, they ought by force of this statute to deliver him; it it be doubtfull and under consideration, he may be bailed.

* * *

4. He may have an action of false imprisonment....

5. He may have a writ **de homine replegiando**....

6. He might by the common-law have had a writ **de odio, et atia**, as you may see before....

2.

From Blackstone, III Commentaries on the Laws of England, 128-138 (1768):

The means of **removing** the actual injury of false imprisonment are fourfold. 1. By writ of **mainprize**. 2. By writ of **de odio et aia**. 3. By writ **de homine replegiando**. 4. By writ of **habeas corpus**.

* * *

4. The writ of **habeas corpus**, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminister, for removing prisoners from one court into another for the more eash administration of justice. Such is the **habeas corpus ad respondendum**, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new

action in the court above. Such is that **ad satisfaciendum**, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. Such also are those **ad prosequendum, testificandum, deliberendum, &c.**; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ **ad faciendum et recipiendum**, which issues out of any of the courts of Westminister-hall, when a person is used in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an **habeas corpus cum causa**) to

do and receive whatsoever the king's court shall consider in without any motion in court, and it instantly supersedes all proceedings in the court below. But in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P.& M. c 13, that no **habeas corpus** shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23, that, where the judge of any inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by **habeas corpus** or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior court by writ of **procedendo** or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five

pounds. But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then by the course of the court, the **habeas corpus** removed both actions together), it is therefore enacted by statute 12 Geo. I. c. 29, that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount.

But the great and efficacious writ, in all manner of illegal confinement, is that of **habeas corpus ad subjiciendum**; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, **ad faciendum, subjiciendum, et recipiendum**, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in

that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term shall intervene, and then it may be returned in court. Indeed if the party were privileged in the courts of common pleas and exchequer, as being an officer or suitor of the court, an habeas corpus ad subjiciendum might also by common law have been awarded from thence; and, if the cause of imprisonment were palpably illegal, they might have discharged him: but, if he were committed

for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench; which occasioned the common pleas to discontenance such applications. It hath also been said, and by very respectable authorities, that the like habeas corpus may issue out of the court of chancery in vacation; but upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his lordship refused it.

In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (certiorari, prohibition, mandamus, &c.) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan,

"it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. So that, if it issued of mere course, without shewing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of a death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out an habeas corpus, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I, to deny a habeas corpus to one confined by the court of

admiralty for piracy; there appearing, upon his own shewing, sufficient grounds to confine him. On the other hand, if a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of habeas corpus is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."

In a former part of these commentaries we expatiated at large on the personal liberty of the subject. This was shewn to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which out not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us, from our Saxon ancestors,

notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of **magna carta**, and long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every ideas of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This induces the absolute necessity of expressing upon every commitment the reason for which it is made:

that the court upon an **habeas corpus** may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they could not upon an **habeas corpus** either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of privy council. This drew on a parliamentary inquiry, and produced the **petition of right**, 3 Car. I, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of him majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government,"

the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, sir Nicholas Hyde, at the same time declaring, that "if they were again remanded for that cause, perhaps the court would not afterwards grant a **habeas corpus**, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present: according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These pitiful evasions gave rise to the statute 16 Car. I.c. 10. § 8. whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members

thereof, he shall granted unto him, without any delay upon any pretence whatsoever, a writ of **habeas corpus**, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, before alluded to, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of **habeas corpus ad subjiciendum** in vacation, though at last he thought proper to award the usual writs **ad deliberendum**, &c, whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great

constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an alias and a pluries, were issued, before he produced the party; and many other vexatious shifts were practised to detain state-prisoners in custody. But whoever will attentively consider the English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous **habeas corpus** act, 31 Car. II. c. 2 which is frequently considered as another **magna carta** of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not

within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts, 1. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them. 3. That on complaint and request in writing by or on behalf of any person committed and charged with any crime, (unless committed for treason or felony expressed in the warrant, or for suspicion of the same, or as accessory thereto before the fact, or convicted or charged in execution by legal process) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copied denied, shall (unless the party has neglected for two terms to apply to any

court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the act), shall for the first offence forfeit 100l. and for the second offence, on penalty of 200l. to the party grieved, and be disabled to hold office. 5. That no person once delivered by habeas corpus, shall be recommitted for the same offence, on penalty of 500l. 6, That every person committed for treason or felony shall, if he requires it the first week of

the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from him imprisonment for such imputed offence: but that no person, after the assises shall be open for the county in which he is detained, shall be removed by habeas corpus, till after the assises are ended; but shall be left to the justice of the judgesof the assise. 7. That any such prisoner may move for and obtain his habeas corpus, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight ofthe warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500l. 8. That this writ of habeas corpus shall run into the counties palatine,

cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500l. to be recovered with treble costs; shall be disable to bear any office of trust or profit; shall incur the penalties of **praemunire**; and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a

temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the **habeas corpus** at common law. But even upon writs at the common law it is now expected by the court, agreeable le to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any **alias** or **pluries**; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for **removing** the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions of the statue), that person apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

HISTORICAL MATERIALS: Blackstone

The satisfactory remedy for this injury of false imprisonment, is by an action of trespass vi et armis, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or vi et armis, liable to pay a fine to the king for the violation of the public peace.

* * *

3.

The Habeas Corpus Act of 1679, 31 Charles II, c 2; 8 Stat at L 432

WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody, any of the Kings's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty ad the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation.

II. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal

matters; (2) be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority thereof, That whensoever any person or persons shall bring any habeas corpus directed unto any sheriff or sheriffs, gaoler, minister or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers or deputy of the said officers or keepers, that the said officer or officers, his or their under officers, under-keepers or deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or

court that awarded the same, and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ (3) and bring or cause to be brought the body of the party so committed or restrained, unto or before the lord chancellor, or lord keeper of the great seal of England for the time being, or the judges or barons of the said court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; (4) and shall then likewise certify the true causes of his detainer or imprisonment, unless certify the true causes of his detainer or imprisonment, unless the commitment of the said party be

in any place beyond the distance of twenty miles from the place or places where such court or person is or shall be residing; and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days, after such delivery aforesaid, and not longer.

III. And to the intent that no sheriff, gaoler or other officer may pretend ignorance of the import of any such writ; (2) be it enacted by the authority aforesaid, That all such writs shall be marked in this manner, Per statutum tricesimo Caroli secundi Regis, and shall be signed by the person that awards the same; (3) and if any person or persons shall be or stand committed or detained as aforesaid for any crime unless for felony or treason plainly expressed in the warrant of commitment, in the vacation-time, and out of

term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process) or any one on his or their behalf, to appeal or complain to the lord chancellor or lord keeper, or any one of his Majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif; (4) and the said lord chancellor, lord keeper, justices or barons or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such persons or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorized and required, upon request made in writing by such person or persons, or any on his, her or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant an

habeas corpus under the seal of such court whereof he shall then be one of the judges, (5) to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable immediate before the said lord chancellor or lord keeper or such justice, baron or any other justice or baron of the degree of the coif of any of the said courts; (6) and upon service thereof as aforesaid, the officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or their deputy in whose custody the party is so committed or detained, shall within the times respectively before limited, bring such prisoner or prisoners before the said lord chancellor or lord keeper, or such justices, barons or one of them, before whom the said writ is made returnable, and in case of his absence before any other of them, with the return of such writ, and the true causes of the commitment and detainer; (7) and

thereupon within two days after the party shall be brought before them, the said lord chancellor or lord keeper, or such justice or baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his or their appearance in the court of King's bench the term following, or at the next assizes, sessions or general gaol-delivery of and for such county, city or place where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognizable, as the case shall require, and then shall certify the said writ with the return thereof, and the said recognizances into the said court where such appearance is to be made; (8) unless it shall appear unto the said lord chancellor or lord keeper or

justice or justices, or baron or barons, that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for the which by the law the prisoner is not bailable.

IV. Provided always, and be it enacted, That if any person shall have wilfully neglected by the space of two whole terms after his imprisonment, to pray a habeas corpus for his enlargement, such person so wilfully neglecting shall not have any habeas corpus to be granted in vacation-time, in pursuance of this act.

V. And be it further enacted by the authority aforesaid. That if any officer or officers, his or their under-officer or under-officers, under-keeper or under-

keepers, or deputy, shall neglect or refuse to make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners according to the command of the prisoner or prisoners according to the command of the said writ, within the respective times aforesaid, or said writ, within the respective times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, shall for the first offence forfeit to the prisoner or party grieved the sum of one hundred pounds; (2) and for the second offence the sum of two hundred pounds; and shall and is hereby made incapable to hold or execute his said

office; (3) the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint or information, in any of the King's courts at Westminister, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution, by Non vult ulterius prosequi, or otherwise, shall be admitted or allowed, or any more than one imparlance; (4) and any recovery or judgment at the suit of any party grieved, shall be a sufficient conviction for the first offence; and any after recovery or judgment at the suit of a party grieved for any offence after the first judgment, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offense.

VI. And for the prevention of unjust vexation by reiterated commitments for the

same offence; (2) be it enacted by the authority aforesaid, That no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause, (3) and if any other person or persons shall knowingly procure or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

VII. Provided always, and be it further enacted, That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol-delivery, after such commitment; it shall and may be lawful to and for the judges of the court of King's bench and justices of oyer and terminer or general gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions or gaol-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the King could not be produced the same term, sessions or general gaol-

delivery; (2) and if any person or persons committed as aforesaid, prayer or petition in open court the first week of the term or upon his first day of the sessions of oyer and terminer and general gaol-delivery, to be brought to his trial, shall not be indicated and tried the second term, sessions of oyer and terminer or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

VIII. Provided always, That nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment of such his criminal offence, he shall be kept in custody according to the law, for such other suit.

IX. Provided always, and be it enacted by the authority aforesaid, That if any

person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; (2) unless it be by habeas corpus or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol; (3) or where any person is sent by order of any judge of assize or justice of the peace, to any common work-house or house of correction; (4) or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; (5) or in cas of sudden fire or infection, or other necessity; (6) and if any person or persons shall after such commitment aforesaid make out and sign, or countersign

any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs, or countersigns such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer the [and] incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved.

X. Provided also, and be it further enacted by the authority aforesaid, That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their habeas corpus as well out of the high court of chancery or court of exchequer, as out of the courts of King's bench or common pleas, or either of them; (2) and if the said lord chancellor or lord keeper, or any judge or judges, baron or barons for the time being, of the degree of the coif, of any of the occurs aforesaid,

in the vacation time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of habeas corpus by this act required to be granted, being moved for a aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid.

XI. And be it declared and enacted by the authority aforesaid, That an habeas corpus according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding.

XII. And for preventing illegal imprisonments in prisons beyond the seas; (2) be it further enacted by the authority aforesaid, That no subject of this realm that now is, or hereafter shall be an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter beyond shall be within or without the dominions of his Majesty, his heirs or successors; (3) and that every such imprisonment is hereby enacted and adjudged to be illegal; (4) and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment, in any of his Majesty's courts of record, against the person or

persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal or countersign any warrant or writing for such commitment, detainer, imprisonment or transportation, or shall be advising, aiding, or assisting in the same, or any of them; (5) and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given, shall not be less than five hundred pounds; (6) in which action no delay stay or stop of proceeding by rule, order or command, nor no injunction, protection or privilege whatsoever, nor any more than one imparlance shall be allowed excepting such rule of the court wherein the action shall depend, made in open court, as shall be thought in justice necessary, for special cause to be expressed in the said rule; (7)

and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer or transportation, or shall so commit, detain, imprison or transport any person or persons contrary to this act, or be any ways advising aiding or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick upon Tweed, or any of the islands, territories or dominions thereunto belonging; (8) and shall incur and sustain the pains, penalties and forfeitures limited, ordained and provided in and by the statute of provision and praemunire made in the sixteenth year of King Richard the Second; (9) and be incapable of any pardon from the King, his heirs or successors, of the said forfeitures, losses or disabilities, or any of them.

XIII. Provided always, That nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.

XIV. Provided always, and be it enacted, That if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons maybe transported into any parts beyond the seas; this act or anything therein contained to the contrary notwithstanding.

XV. Provided also, and be it enacted, That nothing herein contained shall be

deemed, construed or taken, to extend to the imprisonment of any person before the first day of June on e thousand six hundred seventy and nine, or to any thing advised, procured, or otherwise done, relating to such imprisonment; anything herein contained to the contrary notwithstanding.

XVI. Provided also, That if any person or persons at any time resiant in this realm, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; any thing herein contained to the contrary notwithstanding.

XVII. Provided also, and be it enacted, That no person or persons shall be sued, impleaded, molested, or troubled for any offence against this act, unless the party offending be sued or impleaded for the same within two years at the most after such time wherein the offence shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.

XVIII. And to the intent no person may avoid his trial at the assizes or general gaol-delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there; (2) be it enacted, That after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any habeas

corpus granted in pursuance of this act, but upon any such habeas corpus shall be brought before the judge of assize in open court, who is thereupon to do what to justice shall appertain.

XIX. Provided nevertheless, That after the assizes are ended, any person or persons detained, may have his or her habeas corpus according to the direction and intention of this act.

XX. And be it also enacted by the authority aforesaid, That if any information, suit or action shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of this law, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being

pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit or action, and the said matter shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently pleaded, set forth or alleged the same matter in bar or discharge of such information, suit or action.

XXI. And because many time persons charged with petty treason or felony, or as accessaries thereunto, are committed upon suspicion only, whereupon they are bailable, or not, according as the circumstances making out that suspicion are more or less weight, which are best known to the justices of peace that committed the persons, and have the examinations before them, or to other justices of the peace in the county; (2) be it therefore enacted, That where any person shall appear to be committed by any judge or justice of the peace and charged as

accessary before the fact, to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment, that such person shall not be removed or bailed by virtue of this act, or in any other manner than they might have been before the making of this act.

4.

Habeas Provisions of the Judiciary Act of 1789, 1 Stat 73, 81-82.

....**And be it further enacted.** That all the before-mentioned courts of the United States, shall have power to issue writs of **scire facias, habeas corpus**, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have the power to grant writs of **habeas corpus** for the purpose of an inquiry into the cause of commitment. -- **Provided**, That writs of **habeas corpus** shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

5.

The Habeas Corpus Act of 1867, 14 Stat 385

* * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the

detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas of corpus a day

shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The Petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is on contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or

persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of this case. From the fine decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as

for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, the judge hearing said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

Sec. 2. And be it further enacted, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised

under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed [by a] party under such constitution, treaty, statute, commission, or [other law] may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by justice of the Supreme

Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution, or remand the same to an inferior court. This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.

APPROVED, February 5, 1867.

6.

1874 Recodification of the Federal Habeas Statutes, RS 751-766, Title XIII.

THE JUDICIARY. - CH. 13. CHAPTER THIRTEEN. HABEAS CORPUS.

Sec. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.

Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or

omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the Unites States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

Sec. 754. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth in the complaint shall be verified by the oath of the person making the application.

Sec. 755. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

Sec. 756. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond the distance and not beyond a distance of a hundred miles, within ten day; and if beyond the distance of a hundred miles, within twenty days.

Sec. 757. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

Sec. 758. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

Sec. 759. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

Sec. 760. The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

Sec. 761. The court, or justice, or judge shall proceed in a summary way to determine

the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

Sec. 762. When a writ of habeas corpus is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court, or justice, or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the

pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing.

Sec. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted

under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect where of depend upon the law of nations, or under color thereof.

Sec. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section.

Sec. 765. The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the

Supreme Court, or in default thereof, by the court or judge hearing the cause.

Sec. 766. Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void.

APPENDIX D

Growth of State Habeas Corpus Petitions, 1941-1990

Table D

Year	District Court (Total)	State Habeas	Appeals (Total)	Appeals (Habeas)
1941	n/a	127	n/a	n/a
1942	n/a	130	n/a	n/a
1943	n/a	269	n/a	n/a
1944	n/a	605	n/a	n/a
1945	n/a	536	n/a	n/a
1946	n/a	492	n/a	n/a
1947	n/a	485	n/a	n/a
1948	n/a	543	n/a	n/a
1949	n/a	584	n/a	n/a
1950	n/a	560	n/a	n/a
1951	n/a	482	2,982	n/a
1952	n/a	541	3.079	n/a
1953	n/a	548	3,236	n/a
1954	n/a	597	3,481	n/a
1955	n/a	660	3,695	n/a
1956	n/a	734	3,588	n/a
1957	n/a	778	3,701	n/a

1958	n/a	755	3,694	n/a
1959	n/a	822	3,754	n/a
1960	n/a	871	3,899	111
1961	n/a	906	4,204	n/a
1962	n/a	1,232	4,823	n/a
1963	n/a	2,106	5,437	n/a
1964	66,930	3,694	6,023	n/a
1965	67,678	4,845	6,766	571
1966	70,027	5,339	7,183	668
1967	70,961	6,201	7,903	792
1968	71,449	6,201	9,116	1,069
1969	77,193	7,359	8,528	1,197
1970	87,321	9,063	9,661	1,319
1971	93,396	8,372	12,788	1,261
1972	96,173	7,949	15,629	1,319
1973	98,560	7,784	15,629	1,301
1974	103,530	7,626	16,436	1,084
1975	117,320	7,843	16,658	871
1976	130,597	7,833	18,408	866
1977	130,567	6,866	19,118	837
1978	138,770	7,033	18,918	676
1979	154,666	7,123	20,219	859
1980	168,789	7,031	23,200	1,020

Table D

1981	180,576	7,790	26,362	1,258
1982	206,193	8,059	23,551	1,529
1983	241,842	8,532	29,630	1,683
1984	261,485	8,349	26,606	1,609
1985	273,670	8,520	33,360	2,172
1986	254,828	9,040	34,292	2,331
1987	238,982	9,524	35,176	2,755
1938	239,634	9,867	37,524	3,101
1989	233,529	10,545	39,734	3,168
1990	217,879	10,817	40,898	3,170

Source: Adm Off of US Courts, Annual Report of the Director (1960-1990).

Figure D-1

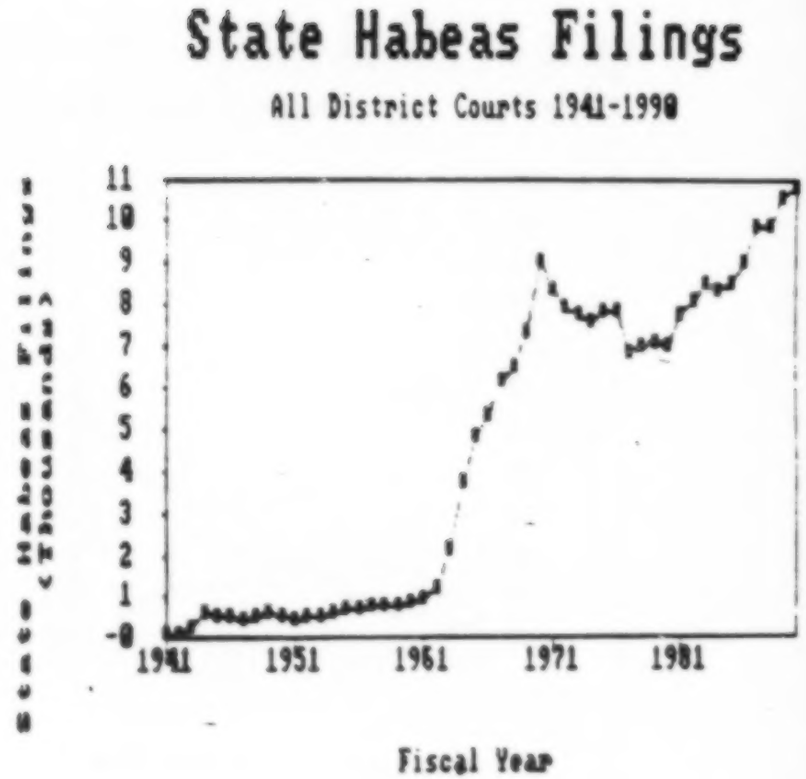


Figure D-2

Figure D-3

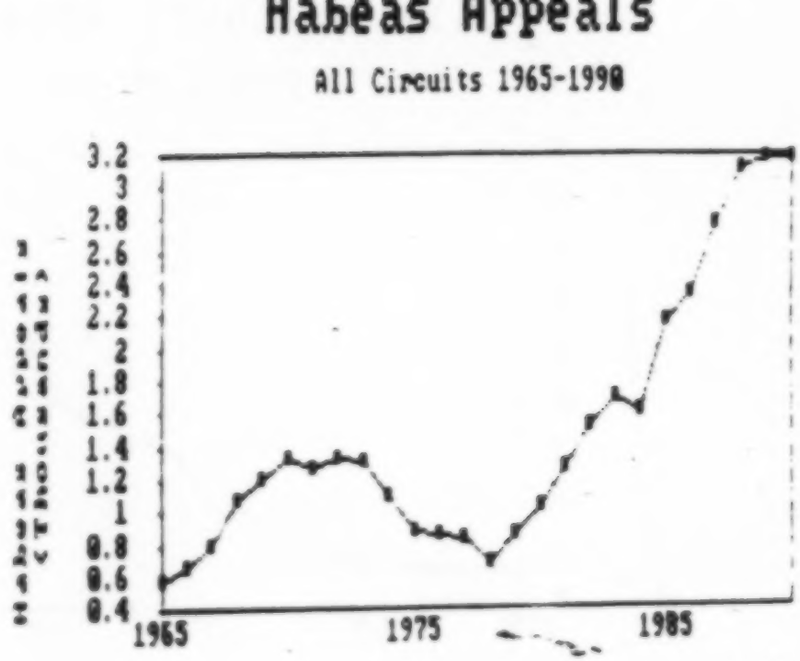
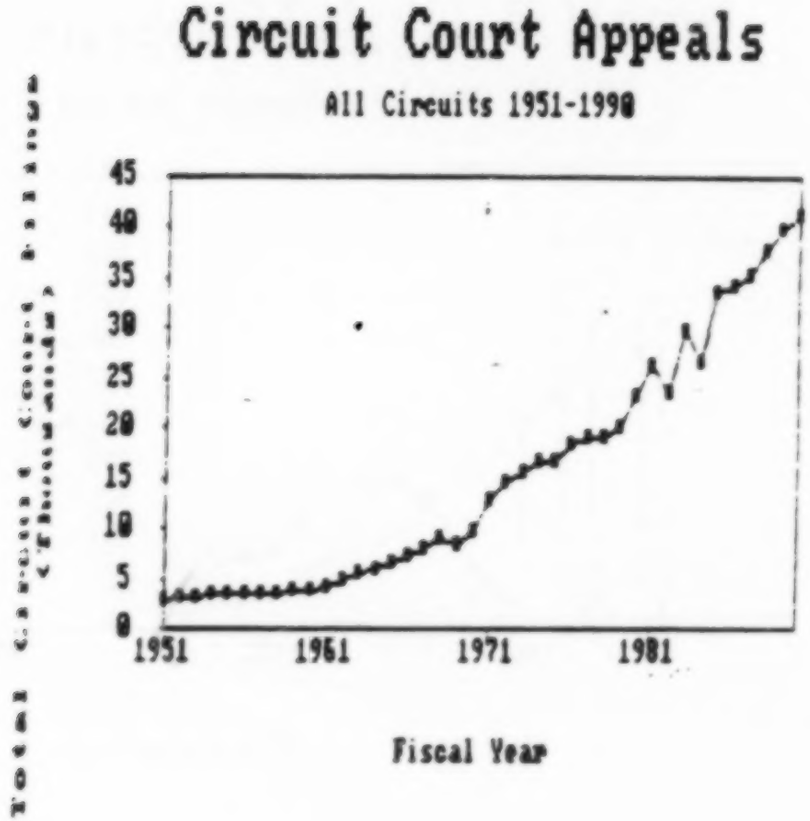


Figure D-4


Circuit Court Appeals
All Circuits 1951-1990
45
40
35
30
25
20
15
10
5
0
1951
1961
1971
1981
Fiscal Year